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No. 94-1878

In The
Supreme Court of the United States
October Term, 1994

THEODORE KRUCKEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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Dated: May 15, 1995

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QUESTION PRESENTED

Did the court of appeals err in failing to find plain error as required by this Court's precedents when the district court did not instruct the jury as to an essential element of the crime charged and further compounded the different interpretations by the various courts of appeals regarding this critical item of criminal law?

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PETITION FOR A WRIT OF CERTIORARI

This petition for a writ of certiorari requests review of an important and recurring issue of federal law that has both confused and sharply divided the lower federal courts: under what circumstances does the complete omission of an essential element of an offense from a jury charge in a criminal matter constitute plain error. Petitioner Theodore Kruckel is just one of the many victims of this confusion.

Fifty years ago, in *Screws v. United States*, 325 U.S. 91, 107 (1945), this Court set forth the venerable and

enduring principle that "[e]ven those guilty of the most heinous offenses are entitled to a fair trial. Whatever the degree of guilt, those charged with a federal crime are entitled to be tried by the standards of guilt which Congress has prescribed." *Screws*, 325 U.S. at 107. Thus, in all criminal cases, the government is required to prove "beyond a reasonable doubt . . . *every* fact necessary to constitute the crime with which [the defendant] is charged." *In re Winship*, 397 U.S. 358, 364 (1970)(emphasis added).

In this case, the Court of Appeals for the Third Circuit flatly rejected these important principles of law when it affirmed the conviction of petitioner Theodore Kruckel, the president of a small community bank, for issuing an unauthorized loan in violation of 18 U.S.C. § 1005. At trial, the undisputed evidence established that both the bank's Board of Directors and its Executive Committee had the power to authorize loans. Nevertheless, in charging the jury on the elements of that crime, the district court failed to instruct that Executive Committee approval, as well as Board of Directors approval, was proper authorization under the statute. For Kruckel, who had admitted that he had issued the subject loan without obtaining Board of Directors approval and rested his defense on the fact that he had obtained the approval of the bank's Executive Committee, this glaring error made his conviction a foregone conclusion as well as highly improper.

Concededly, Kruckel failed to object to the charge either at trial or in his post-trial motions. On appeal, the

court of appeals found no plain error, implicitly adopting the district court's analysis which concluded that the jury could have found from the evidence at trial that there was no Executive Committee approval.[1] Under *Screws* and *Winship*, however, what the jury *would* have found if it had been asked to consider such approval is irrelevant. What is critical is that the jury was not asked to, and did not, find beyond a reasonable doubt that there was no Executive Committee approval. Thus, the charge resulted in Kruckel's conviction for an act which is not a crime.

For the foregoing reasons, this case provides this Court the opportunity not only to remedy a grave injustice, but also to clarify the circumstances under which a court's failure to charge the jury as to an essential element of a crime requires reversal even when no objection has been raised to the charge.

OPINIONS BELOW

None of the opinions and orders in this case are officially reported. The district court's May 5, 1994 opinion and order denying petitioner's post-trial motions are included in the Appendix at App. 3-83. The district court's May 20, 1994 order entering judgment against Kruckel and imposing sentence is included in the Appendix at App. 84-86. The court of appeals' March 3, 1995 order affirming

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[1] The panel of the court of appeals did so without any discussion whatsoever, by the use of a judgment order.

Kruckel's conviction and sentence can be found at App. 1-2. Finally, its April 7, 1995 order denying the petition for rehearing and suggestion for rehearing *in banc* is included in the Appendix at App. 87.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on March 3, 1995. The order denying the petition for rehearing and suggestion for rehearing *in banc* was entered on April 7, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. § 1005, as it existed in 1986, provides:

> Whoever, being an officer, director, agent or employee of any Federal Reserve bank, member bank, national bank or insured bank, without authority from the directors of such bank, issues or puts in circulation any notes of such bank; or
>
> Whoever, without such authority, makes, draws, issues, puts forth, or assigns any certificate of deposit, draft, order, bill of exchange, acceptance, note, debenture, bond, or other obligation, or mortgage, judgment or decree;
>
> * * *

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank or trust company, which has become a member of one of the Federal Reserve banks; and "insured bank" includes any state bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation.

STATEMENT OF THE CASE

Until 1991, Petitioner Theodore Kruckel was the president and chief operating officer of Urban National Bank, a small community bank that he and his father-in-law founded in 1962. As chief operating officer, Kruckel was responsible for the bank's daily operations, including loans and investments.

In 1986, Kruckel issued a $1.25 million dollar loan to James Roberts, a close friend of one of the bank's most valued and trusted customers, Robert Libutti. Kruckel did so based both on Libutti's assurance that Roberts was a good credit risk and on the representation that Roberts would use the proceeds of the loan to purchase an interest in a Mercedes dealership. Roberts, however, rather than

investing in the dealership, gave the money to Libutti and then defaulted on the loan.

In 1992, the government brought charges against Kruckel, alleging, among other things, that Kruckel had issued the Roberts loan without proper authorization in violation of 18 U.S.C. § 1005.[2] Kruckel had not sought or obtained authorization for the loan from the bank's Board of Directors, but he had obtained the approval of its Executive Committee. Based on witness testimony at trial that such Executive Committee approval was accepted in the industry and specifically authorized by the written bylaws of the bank, the district court found that Executive Committee approval, as well as Board of Directors approval, could satisfy the authorization requirement of the statute. *See, e.g.*, App. 11, 19, 25-26.

Nevertheless, when charging the jury as to the essential elements of 18 U.S.C. § 1005, the district court failed to incorporate this finding into its instruction. Thus, the district court charged that:

> In order to find a defendant guilty of an offense under . . . Section 1005, you must find that the United States has proven the

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[2] Kruckel was indicted on eleven counts, including charges of fraud and conspiracy to defraud in connection with the Roberts loan. He was acquitted of all but the single conviction at issue here.

> following three elements beyond a reasonable doubt.
>
> *First*: That the defendant issued a draft, order, bill of exchange or other obligation of the Bank;
>
> *Second*: That the defendant did so *without the authority of the Board of Directors*;
>
> *Third*: That the defendant did so knowingly and wilfully with intent to injure or defraud the Bank.

App. 31. Because Kruckel's primary defense to the crime charged was that he had obtained the requisite approval from the Executive Committee rather than the Board of Directors and the charge did not instruct the jury to consider Executive Committee approval, it is not surprising that the jury found Kruckel guilty of issuing a loan without proper authorization.

Kruckel filed post-trial motions in which he argued, among other things, that there was irrefutable evidence which demonstrated the approval of the loan by the Executive Committee and, thus, there was inadequate evidence to sustain the conviction. The district court, assuming that the jury had considered Executive Committee approval and found none, concluded that the government had produced sufficient evidence that such approval may have been flawed to sustain the jury verdict, notwithstanding the documentary and testimonial evidence to the contrary.

App. 8-26. The district court therefore denied Kruckel's motions on May 5, 1994.

On May 24, 1994, the district court sentenced Kruckel, who is almost sixty years of age, and has had an unblemished record, to three years in prison, fined him $50,000, and ordered that he make restitution in the amount of $500,000 to be paid from his retirement fund. App. 84-86.

Kruckel filed an appeal with the Court of Appeals for the Third Circuit, contending that the district court had erred in failing to charge the jury that Executive Committee approval would satisfy the approval element of § 1005. On March 3, 1995, the United States Court of Appeals for the Third Circuit entered a judgment order affirming the district court's May 20, 1994 judgment. App. 1.

REASONS FOR GRANTING THE WRIT

This Court should grant this petition for a writ of certiorari because: (1) the issue of whether the omission of an essential element of a criminal offense constitutes plain error has created profound conflicts among the circuits; and (2) the decision of the United States Court of Appeals for the Third Circuit in this case conflicts with the applicable precedents of this Court.

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE ISSUE OF WHETHER THE OMISSION OF AN ESSENTIAL ELEMENT OF AN OFFENSE FROM A JURY CHARGE CAN FAIL TO CONSTITUTE PLAIN ERROR IS IMPORTANT AND RECURRING AND HAS CREATED PROFOUND CONFLICTS AMONG THE CIRCUITS.

Ever since *Screws*, lower federal courts have grappled with the issue of when the omission of an essential element of an offense requires reversal of a conviction when no objection to the charge has been made at trial. This issue is extremely important because, when decided incorrectly, it results in the conviction and imprisonment of individuals whose guilt has not been proven in accordance with the mandates of the United States Constitution.

The court of appeals' affirmance of Kruckel's conviction is a prime example of the dangers that await if this question remains unresolved. In permitting the conviction to stand, based on the district court's conclusion that, *if* the jury had considered each essential element of a crime under 18 U.S.C. § 1005, it could have convicted Kruckel anyway, the court of appeals' extinguished Kruckel's right to a trial by jury on each element of the offense with which charged.

Clearly, such an important issue of federal law that affects so many cases across the nation deserves a uniform approach. However, there is no uniformity or consistency

with regard to when courts find plain error resulting from the failure to charge a jury as to all of the essential elements of a crime. Rather, the courts employ a wide variety of approaches when determining whether to reverse convictions under such circumstances.

Both intra- and inter- circuit conflicts abound. Two courts of appeals have stated that the omission of an essential element of a offense is *per se* plain error but, at times, have employed a harmless error standard. (Fifth, Ninth). Another has also sent mixed signals, suggesting at one time that the omission of an essential element of a crime is *per se* plain error and suggesting at another time that such an omission is not plain error if the omitted element is undisputed. (Second). Two courts of appeals agree that the that omission of an essential element is *per se* plain error. (Fourth, Sixth). Two others appear to agree that a harmless error standard should apply, but articulate that standard in different ways. (Third, Seventh). One last court of appeals has suggested that there is no plain error when the court's failure to charge on the essential element is "excusable." (First).

In short, federal courts are badly splintered as to what is necessary to find plain error when an essential element of an offense is omitted from the court's charge to the jury. The following brief summary of decisions on this issue in the courts of appeals makes clear that the lower courts are in total disarray on this important issue of federal law.

The Court of Appeals for the First Circuit

In *United States v. Marder*, 48 F.3d 564, 573 (1st Cir.), *cert. denied*, – U.S. –, 63 U.S.L.W. 3721 (1995), the Court of Appeals for the First Circuit analyzed the district court's failure to instruct a jury as to an essential element of a crime using the plain error test set forth in *United States v. Olano*, – U.S. –, 113 S. Ct. 1770, 1778-79 (1993). It found that the error did not "seriously affect the fairness, integrity or public reputation of judicial proceedings", *id.* at 574 (quoting *Olano*, 113 S. Ct. at 1778-79), because (1) there was "not insubstantial" evidence of the omitted element; and (2) the court's error was "excusable" given the state of the law at the time it gave the erroneous charge. *Id.* at 575. Accordingly, the court stated:

> While we in no way disparage the importance of the due process and Sixth Amendment rights that may be undermined when jury instructions misdescribe or fail to describe an element of the offense charged, we simply do not think that a deprivation of these rights in all circumstances is so "shocking" as to require automatic reversal even where the defendant has failed to bring the error to the attention of the trial judge.

Id. at 574.

The Court of Appeals for the Second Circuit

The Court of Appeals for the Second Circuit has attempted to avoid deciding the issue of whether a trial judge's failure to instruct the jury on an essential element of a crime charged is *per se* error. In *United States v. Smith*, 939 F.2d 9, 11 (2d Cir. 1991), the court admitted that the question was "a close one" and found that "[u]nder the facts presented here . . ., we need not resolve the difficult question of the proper standard of review" because, even without using a *per se* rule, reversal was required in that case under a plain error standard.

As the *Smith* court acknowledged, however, other courts in the circuit have not been of one mind. *Id.* In *United States v. Mazzei*, 700 F.2d 85, 88 (2d Cir.), *cert. denied*, 461 U.S. 945 (1983), the court stated unequivocally that the defendant's "contention that the district court failed to charge an essential element of the . . . offense, if established, would amount to plain error." On the other hand, in *Washington v. Harris*, 650 F.2d 447, 453-54 (2d Cir. 1981), *cert. denied*, 455 U.S. 951 (1982), the court suggested that an erroneous instruction may be harmless if the defendant has "effectively conceded" the element that was incorrectly charged.

The Court of Appeals for the Third Circuit

In *United States v. Retos*, 25 F.3d 1220, 1231 (3d Cir. 1993), the Court of Appeals for the Third Circuit explained that "omission of an essential element of an offense *ordinarily* constitutes plain error", but refused to adopt a *per se* rule to that effect. *See also United States v. Xavier*, 2 F.3d 1287 (3d Cir. 1993). Instead, it employed a test whereby it asked whether the evidence the government presented on the omitted element was "conclusive." 25 F.3d at 1232 (finding plain error because evidence was inconclusive).

In explaining why a *per se* rule was not appropriate, the court in *Retos* pointed to *United States v. Anderson*, 859 F.2d 1171 (3d Cir. 1988). 25 F.3d at 1232 n.14. In *Anderson*, the court stated that a determination as to whether plain error occurred requires the court to "examine the entire record including the evidence of [the defendant's] guilt." 859 F.2d at 1176. Thus, the court found no plain error when the trial court failed to instruct the jury that it was required to agree unanimously on three violations of the federal drug laws to convict the defendant of a continuing criminal enterprise, because the jury had also convicted the defendant of three counts of distribution. *Id.*

The Court of Appeals for the Fourth Circuit

The Court of Appeals for the Fourth Circuit has held that the failure to instruct on an essential element of an offense is plain error because "the jury could not have been

expected to make a finding beyond a reasonable doubt [regarding the essential element] in the face of an instruction to the contrary." *United States v. Rogers*, 18 F.3d 265, 268 (4th Cir. 1994).

The Court of Appeals for the Fifth Circuit

The Court of Appeals for the Fifth Circuit has stated that "[i]t is plain error for a judge to fail to instruct the jury on all the essential elements of a crime, even though such instruction is not requested." *United States v. Ortega*, 859 F.2d 327, 333 (5th Cir. 1988)(citation omitted)(finding no omission of essential element), *cert. denied*, 489 U.S. 1027 (1989). On the other hand, it has also employed a harmless error standard, stating that "[w]hen an after-the-fact review of the entire transcript discloses that . . . no prejudice to the defendant's rights could have resulted from narrowing the jury's ambit . . . , a plain error reversal . . . is not required." *United States v. Herzog*, 632 F.2d 469, 472 (5th Cir. 1980)(citation omitted)

Thus, in *Herzog*, the Fifth Circuit stated that there was no plain error when "there was not a smidgeon of evidence" suggesting that the omitted essential element was not satisfied so that it was "clear" the government had met its burden of proof. 632 F.2d at 472. And in *United States v. White*, 611 F.2d 531, 537 (5th Cir. 1980), the court found no plain error when there was "sufficient evidence for a jury to conclude" that the omitted essential element had been satisfied by the government.

The Court of Appeals for the Sixth Circuit

In *Hoover v. Garfield Heights Municipal Court*, 802 F.2d 168, 175-78 (6th Cir. 1986), the Court of Appeals for the Sixth Circuit stated that failure to instruct on an essential element of the crime is always plain error. As the court explained, "when an instruction prevents the jury from considering a material issue, it is equivalent to a directed verdict on that issue and therefore cannot be considered harmless." *Id.* at 177.

The Court of Appeals for the Seventh Circuit

The Court of Appeals for the Seventh Circuit has held that there is no plain error when the essential element that is omitted from the jury charge is "not contestable and was barely if at all contested", *United States v. Kerley*, 838 F.2d 932, 939 (7th Cir. 1988), because, under those circumstances, "[n]o reasonable jury could . . . conclude[]" that the omitted element was unsatisfied. *Id.* at 937. On the other hand, if an essential element was omitted from the charge and the government presented no evidence on that element, there is plain error. *United States v. Jones*, 21 F.3d 165, 173 (7th Cir. 1994).

In another case where the defendant argued on appeal that the district court had omitted an essential element from the charge, the Court of Appeals for the Seventh Circuit stated that "it is rare for an improper instruction to justify reversal of a criminal conviction when no objection has been

made in the trial court." *United States v. Shetterley*, 971 F.2d 67, 73 (7th Cir. 1992)(citation omitted). But it then went on to state that "[t]o determine whether a jury instruction was plain error, we must examine the entire trial record to see if the instruction had a *probable* impact on the jury's finding." *Id.* (citation omitted)(emphasis added).

The Court of Appeals for the Ninth Circuit

In *United States v. Whitmore*, 24 F.3d 32, 36 (9th Cir. 1994), the Court of Appeals for the Ninth Circuit held that a district court's failure to submit an essential element of a crime to the jury does not constitute plain error when the court "can be certain that the evidence the jury actually considered in accordance with the [other] instructions the district court actually gave is so overwhelming as to leave it beyond reasonable doubt that the jury would have convicted [the defendant] even if the district court had given the [omitted] instruction . . . ." Thus, because the jury in that case had essentially found the requisite knowledge in connection with other charged offenses, the court found that the omitted element undoubtedly had been satisfied. *Id.* at 35-37.

Just five weeks later, the Court of Appeals for the Ninth Circuit, sitting *in banc*, issued an opinion that appeared to overrule *Whitmore*. In *United States v. Gaudin*, 28 F.3d 943, 951 (9th Cir. 1994), *cert. granted, in part, on other grounds*, 115 S. Ct. 713 (1995), the court unequivocally held that the trial court's failure to charge on an essential

element of an offense "cannot be harmless." As it explained:

> We may [not] consider the strength of evidence and determine whether it was so clear that the jury would have found the element of a crime to exist, had it been properly instructed, but, instead, we must determine whether the jury was actually able to consider that evidence under the instructions given by the court. When proof of an element has been completely removed from the jury's determination, there can be no inquiry into what evidence the jury considered to establish that element because the jury was precluded from considering whether the element existed at all.

Id. The court went on to explain that the plain error test set forth in *United States v. Olano*, -- U.S. --, 113 S. Ct. 1770 (1993), is always satisfied "when a defendant has not been accorded his Fourth and Sixth Amendment rights to a jury determination of the existence of an essential element of the crime." 28 F.3d at 952.

* * *

In sum, there is simply no uniform approach among the courts of appeals with respect to the circumstances in which omission from the jury instructions of an essential element of an offense when there has been no objection at trial constitutes reversible error. To the contrary, the courts are badly divided, both within and among the circuits. This

Court should therefore grant certiorari to resolve these conflicts.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE THIRD CIRCUIT COURT OF APPEALS IN *KRUCKEL* CONFLICTS WITH THE APPLICABLE PRECEDENTS OF THIS COURT.

The court of appeals' affirmance of Kruckel's conviction, based upon the district court's finding that there was evidence from which the jury could have found that Kruckel had not obtained Executive Committee approval, although there was clear evidence that he had obtained such approval, stands in sharp conflict with the precedents of this Court. Whether using a *per se* plain error approach or engaging in a harmless error inquiry (which is the *most* lax approach this Court would even arguably sanction with regard to such errors), the Court of Appeals for the Third Circuit should have vacated Kruckel's conviction and granted him a new trial.

As early as 1945, this Court set forth the uncontroverted principle that "[e]ven those guilty of the most heinous offenses are entitled to a fair trial. Whatever the degree of guilt, those charged with a federal crime are entitled to be tried by the standards of guilt which Congress has prescribed." *Screws v. United States*, 325 U.S. 91, 107 (1945). Accordingly, this Court has stated that the government is required in all criminal cases to prove "beyond a reasonable doubt . . . *every* fact necessary to

constitute the crime with which [the defendant] is charged." *In re Winship*, 397 U.S. 358, 364 (1970)(emphasis added).

Plainly, "to hypothesize a guilty verdict that was never in fact rendered - no matter how inescapable the findings to support that verdict might be - would violate the jury-trial guarantee." *Sullivan v. Louisiana*, – U.S. –, 113 S. Ct. 2078, 2082 (1993). Thus, in *Yates v. Evatt*, 500 U.S. 391, 404 (1991), this Court announced that when assessing whether an instructional error is harmless, the court must ask first "what evidence the jury *actually* considered" in light of the court's instructions and then "whether the force of [that] evidence is so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of" the error.[3] 500 U.S. at 404 (emphasis added).

In the present case, Theodore Kruckel was deprived of his constitutional right to have the government prove "beyond a reasonable doubt . . . *every* fact necessary to constitute the crime with which he [was] charged." *Winship*, 397 U.S. at 364 (emphasis added). This occurred when the district court charged that the second element of 18 U.S.C. § 1005 required the jury to find that Kruckel acted without

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[3] Although the *Yates* decision was made in the harmless error context and the Court was considering the effect of an erroneously-included mandatory rebuttable presumption, the logic and ultimate conclusions of it and its progenitors are of equal force in the plain error context.

the authority of the Board of Directors, rather than instructing that the second element could be satisfied with *either* Board of Directors *or* Executive Committee approval.

There is no question that the jury should have been instructed that either type of approval could satisfy the statutory requirements. As the district court stated in its opinion:

> At [Urban], the original 1962 bylaws of the bank granted the Executive Committee equal power with the Board of Directors to approve loans. (Ex. D-1(c)). On October 14, 1974, the Board's minutes reflect a resolution that the Executive Committee has the authority to loan money to the same extent as the Board, Ex. D-13, as explained by Edward O'Connor, who was a Member of the Board for 25 years and also a member of the Executive Committee at all relevant times. Thus the approval of a loan submitted to the Executive Committee in a proper format under the bank's procedures would be the equivalent of approval by the Board.

App. 19. The court went on to state that:

> [B]anks can permissibly function by Executive Committees or Boards of Directors ratifying the loans made by officers of the bank . . . Thus, it would not necessarily have been a violation of section 1005 if Mr. Kruckel had . . . sought and received after-the-fact

> authorization for the Roberts loan . . . from *the Executive Committee or the Board.*

App. 25-26 (emphasis added).

The district court's omission of Executive Committee approval from the second element of the charge was a clear failure "to submit to the jury the essential ingredients of the only offense on which the conviction could rest" and cannot be viewed as harmless. *Screws*, 325 U.S. at 107. Kruckel's primary defense to the charge under § 1005 was not that there was Board of Directors approval, but that he had obtained Executive Committee approval of the Roberts loan. Thus, this was the crucial question for the jury. The error in the charge, however, precluded the jury from considering the considerable evidence of Executive Committee approval. *See Yates*, 500 U.S. at 403 (It is a "sound presumption of appellate practice[] that jurors are reasonable and generally follow the instructions they are given").[4]

Assuming, *arguendo*, that the materiality of the district court's error is a proper consideration, there is no question that the error in this case was material. This fact is highlighted by the district court's opinion on Kruckel's post-

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[4] In this case, a copy of the jury charge was given to the jury for use in their deliberations. Furthermore, the jury inquired about the written instructions regarding § 1005. *See* App. 39. Thus, there can be no doubt that the jury adhered to those instructions.

trial motions which reveals that the court believed, albeit incorrectly, that the issue of Executive Committee approval had been submitted to the jury. In fact, in searching the record for evidence to sustain the jury's verdict, the court explicitly considered whether the jury could have reached a decision to "disregard" the Executive Committee "minute entries" reflecting its approval of the loan based on evidence of fraudulent conduct. App. 23. The district court would not have considered this question if it had believed either that Executive Committee approval was irrelevant to a violation of § 1005 or that the jury had not been instructed to consider Executive Committee approval of the loan.

The district court's analysis of how the jury could have disregarded the evidence of Executive Committee approval is meaningless in light of the fact that the jury was never instructed that it could consider such approval. When a jury has not been instructed to consider particular evidence, it is improper for a court to "hypothesize" as to what the jury would have found had it considered that evidence. Under *Screws*, Kruckel is entitled to have a jury determine whether the Executive Committee approved the Roberts loan. Only by permitting a jury to do so can Kruckel be validly convicted.

If there was in fact Executive Committee approval, and there is clear evidence that there was, Kruckel was convicted of a bank procedure that is not a crime. In that case, without action by this Court, the trial court's error will result in an innocent person, with no prior criminal

record, serving three years in jail and forfeiting his hard-earned retirement fund. Such a result is unconscionable.

CONCLUSION

For the foregoing reasons, petitioner Theodore Kruckel respectfully requests that this Court grant his petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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[1] The Order states that it is affirming the May 24, 1994 Order of the district court, but the district court's order was actually entered and filed on May 20 and simply *docketed* on May 24.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-5301

UNITED STATES OF AMERICA,

V.

THEODORE KRUCKEL,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 0312-1 : 92-cr-00611-1)
District Judge: Hon. Jerome B. Simandle

Argued February 27, 1995

Before: SLOVITER, *Chief Judge*, NYGAARD,
and McKEE, *Circuit Judges*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, to wit:

1. Kruckel was indicted on one set of facts and tried on another in violation of his constitutional right to indictment by a grand jury;

2. There was insufficient evidence to prove the lack of authorization under Count Nine;

3. The jury instructions as applied to Count Nine permitted the jury to convict based on incorrect standards;

4. Other legal issues require a new trial; and

5. Three other legal issues each independently require a dismissal of the conviction,

It is ORDERED and ADJUDGED that the judgment of the district court entered May 24, 1994 be and is hereby affirmed.

By the Court,

/s/ D K Sloviter
Chief Judge

Attest:

/s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

Dated: Mar. 3, 1995

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	Cr. No.
	:	92-611(JBS)
v.	:	
	:	OPINION
THEODORE KRUCKEL,	:	
Defendant.	:	(Filed
	:	May 5, 1994)

APPEARANCES:

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SIMANDLE, District Judge:

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1. Introduction

Presently before the court are the post-trial motions of defendant, Theodore Kruckel. On October 15, 1993, a unanimous jury returned a verdict acquitting Theodore Kruckel on Counts 1, 2, 4, 5, 7, 8, 11, 12, 13, and 14 of the Second Superseding Indictment and convicting Mr. Kruckel on Count 9, which charged the defendant with violating 18 U.S.C. §§ 1005 and 2.[1] Mr. Kruckel moves

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[1] No other counts were before the jury. The Second Superseding Indictment was returned against Mr. Kruckel and codefendant Robert LiButti, but the trials were subsequently severed and certain counts, which charged only defendant LiButti, were redacted from the indictment provided to the jury at Mr. Kruckel's trial.

This decision upon Mr. Kruckel's post-trial motions was deferred pending conclusion of Mr. LiButti's trial on related charges to avoid any prospect of prejudice to LiButti arising from publicity of Kruckel's conviction, and with the consent of Mr. Kruckel. Defendant LiButti was subsequently convicted by a jury upon five counts of the six-count Fourth Superseding Indictment on February 25, 1994. Defendant LiButti was thus convicted of conspiracy to commit bank fraud in connection with the $1.25 million loan by Urban National Bank to James Roberts, in violation of 18 U.S.C. § 371 (Count 4), and bank fraud in connection with this loan, in violation of 18 U.S.C. § 1344 (Count 5), as well as three tax-related charges (Counts 1, 2 and 3). Defendant LiButti's trial on Count 6 (possession of firearms by a convicted felon in violation of 18 U.S.C.

pursuant to Rule 29(c), Fed.R.Crim.P., for a verdict of acquittal and alternatively pursuant to Rule 33, Fed.R.Crim.P., for a new trial as to Count 9 of the Second Superseding Indictment.

A Grand Jury in Newark, New Jersey originally returned an Indictment against Theodore Kruckel and Robert LiButti on October 29, 1992. A Superseding Indictment was returned on January 14, 1993. The Government later returned to the Grand Jury and obtained a Second Superseding Indictment, which was handed down on May 14, 1993. The Second Superseding Indictment, like the two preceding Indictments, charged Mr. Kruckel with various crimes allegedly arising from a fraud that he and others allegedly perpetrated against the Urban National Bank ("UNB"), of which he was the President. This court severed the trials against the defendants, and the case against Mr. Kruckel was tried first.

The trial lasted five weeks. A brief overview of the counts upon which evidence was presented but upon which Mr. Kruckel was acquitted follows. Count 1 of the Second Superseding Indictment identified Theodore Kruckel as the president of UNB, as well as a member of and secretary to UNB's Board of Directors and a member of UNB's Executive Committee. It identified Robert

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§ 922(g)(1)), was severed from his trial on the first five counts; the trial commenced February 28, 1994 and was interrupted on March 3, 1994 due to Mr. LiButti's illness, and when Mr. LiButti's physicians, as well as the government's examining physician, recommended against resuming defendant's trial, the court granted defendant's motion for mistrial by Order filed April 21, 1994.

LiButti as a "UNB borrower." Count 1 charged that from in or about September, 1985 to about March, 1987, Mr. Kruckel conspired with Mr. LiButti to defraud UNB of a substantial portion of its assets. Specifically, it charged that the object of the conspiracy was to fraudulently transfer UNB funds to defendant LiButti in violation of Office of the Comptroller of the Currency ("OCC") regulations limiting the total amount of credit that could be extended to any one borrower, and contrary to UNB's internal rules limiting defendant Kruckel's authority to issue loans without approval from UNB's Executive Committee and/or Board of Directors.

Counts 2 through 14 relate to the conspiracy alleged in Count 1. Count 2 charged that Mr. Kruckel knowingly and willfully issued, without authorization, a $500,000 cashier's check to Mr. LiButti with an intent to injure and defraud UNB in violation of 18 U.S.C. §§ 1005 and 2. Count 4 of the Second Superseding Indictment charged that defendant Kruckel, in violation of 18 U.S.C. §§ 1344 and 2, attempted to defraud UNB through the issuance of a $1,000,000 nominee loan ostensibly payable to a John Ballis but which allegedly wound up being paid to Mr. LiButti. Count 5 charged Mr. Kruckel with issuing the unauthorized checks used to pay the Ballis loan referenced in Count 4 in violation of 18 U.S.C. §§ 1005 and 2. Count 7 of the Second Superseding Indictment charged defendant Kruckel with knowingly placing a false entry into the Board of Directors, minute books in an attempt to defraud UNB, its Board, and the OCC. Count 8 charged Mr. Kruckel with violations of 18 U.S.C. §§ 1344 and 2 in connection with an alleged nominee loan paid to James Roberts, the proceeds of which were allegedly credited to

the benefit of Mr. LiButti. Count 11 accused Mr. Kruckel of misapplication of approximately $1,200,000 in violation of 18 U.S.C. §§ 656 and 2. Counts 12 and 13 charged that defendant Kruckel, in an attempt to conceal his participation in the fraud on UNB, testified falsely in a proceeding conducted by the OCC, in violation of 18 U.S.C. §§ 1621 and 2. Count 14 further alleged that defendant Kruckel suborned perjury when he counseled James Roberts, Mr. LiButti's alleged nominee, to lie to the OCC.

The sole count of conviction was Count 9. Count 9 charged Mr. Kruckel with violating 18 U.S.C. §§ 1005 and 2 for his role in the alleged Roberts nominee loan scheme. Specifically, Mr. Kruckel was charged in Count 9 with knowingly and wilfully without authority from the directors at UNB, issuing two cashier's checks which constituted the proceeds of the Roberts loan with intent to injure and defraud UNB in violation of 18 U.S.C. §§ 1005 and 2.

Mr. Kruckel raises eleven points which he argues require the granting of post-trial relief under Rules 29(c) and/or 33. I address each of the defendant's arguments in turn.

2. Defendant's Argument that the Conviction on Count 9 Was Based Upon Insufficient Evidence, Requiring the Court to Enter a Verdict of Not Guilty

Defendant Kruckel challenges the jury's guilty verdict on Count 9, arguing that the verdict was based on insufficient evidence and that the court must therefore enter a verdict of acquittal as to that count. In assessing a

motion for a verdict of acquittal, the court must determine whether, viewing the evidence in a light most favorable to the Government, there is substantial evidence upon which a reasonable jury could have based a verdict. *See United States v. Shirk*, 981 F.2d 1382, 1387 (3d Cir. 1992); *United States v. Eufrasio*, 935 F.2d 553, 577 (3d Cir.), *cert. denied*, 112 S.Ct. 340 (1991). The court must not invade the jury's province by reevaluating the credibility of witnesses, *see United States v. Mariani*, 725 F.2d 862, 865 (2d Cir. 1984); evidentiary sufficiency is the sole issue for the court's consideration. *See United States v. Cicco*, 938 F.2d 441, 446 (3d Cir. 1991). "The evidence need not unequivocally point to the defendant's guilt as long as it permits the jury to find the defendant guilty beyond a reasonable doubt." *United States v. Pungitore*, 910 F.2d 1084, 1129 (3d Cir. 1990).

The court has reviewed the evidence and finds that a substantial basis existed for the jury's verdict.

Count 9 charged defendant Kruckel as being an officer and director of UNB who knowingly, willfully and without authority from the directors of UNB issued two cashiers checks payable to the benefit of Robert LiButti as proceeds of a $1,250,000 loan to James Roberts on September 15, 1986, with intent to injure or defraud UNB, in violation of 18 U.S.C. § 1005. Section 1005, as it existed in 1986, provided in relevant part:

> Whoever being an officer, director, agent or employee of any Federal Reserve bank, member bank, national bank or insured bank, without authority from the directors of such bank, issues or puts in circulation any notes of such bank; or

> Whoever, without such authority, makes draws, issues, puts forth, or assigns any certificate of deposit, draft, order, bill of exchange, acceptance note, debenture, bond, or other obligation, or mortgage, judgment or decree; or
>
> Whoever makes any false entry in any book, report, of statement of such bank with intent to injure or defraud such bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, or the Board of Governors of the Federal Reserve System –
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both. . . .

Count 9 thus arose under the second unnumbered subparagraph of section 1005. As discussed further below,[2] the United States was required to prove three elements beyond a reasonable doubt:

> *First*: That the defendant issued a draft, order, bill of exchange or other obligation of the Bank;
>
> *Second*: That the defendant did so without the authority of the Board of Directors;
>
> *Third*: That the defendant did so wilfully with intent to injure or defraud the Bank.[3]

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[2] See Section 2, below, for discussion of elements of offense under 18 U.S.C. § 1005.

[3] *Id.*

The government produced sufficient evidence upon each element to sustain the jury's verdict on Count 9, notwithstanding defendant's position regarding contradictory evidence. There was no dispute at trial that Mr. Kruckel was President of UNB, that UNB was an insured bank, and that the two UNB loan proceed checks were drafts or obligations of UNB within the mean of section 1005, *supra*. The contested issues were whether Kruckel acted without authority of the Board or its Executive Committee in approving the loan and whether he acted wilfully with intent to injure or defraud the bank.

The testimony of James Roberts indicated that Roberts was an unemployed car salesman from April – December, 1986, having been formerly employed as a sales manager for a Mercedes dealership in Southampton, Long Island, New York. Roberts had met Robert LiButti in late 1984 or early 1985 and developed a friendship based on car dealing, casino gambling and race horses. Roberts met Kruckel several times beginning in 1984 or 1985, including in Atlantic City and at Southampton where Kruckel had purchased a car. Roberts also met Kruckel at Gulfstream Park racetrack in Florida in January, 1986, when Roberts and LiButti traveled there to see the racehorse "Groovy" run in a race. "Groovy" was a thoroughbred regarded as one of the fastest horses, and he ran in the Kentucky Derby in May, 1986. There was strong evidence that defendant Kruckel was the owner of Groovy at that time, discussed below. Roberts never had an ownership interest in Groovy, according to his testimony, which was uncontradicted.

By September, 1986, Roberts had become unemployed. On September 15, 1986, LiButti asked Roberts to

meet him at UNB. According to Roberts' testimony, Roberts understood that LiButti wanted him to sign a loan for $1.25 million in Roberts' name so that Kruckel could give the proceeds to LiButti to cover some of LiButti's overdrafts at the bank, because Kruckel wanted to conceal his problem in having overextended credit to LiButti and because LiButti could not get more loans in his own name.

Roberts testified that he met LiButti at Kruckel's Bank office on September 15th, and that Kruckel prepared and furnished Roberts with a promissory note (Ex. G-816) listing Roberts as the borrower and "Groovy" as the collateral for a commercial loan of $1.25 million. Kruckel filled out much of the information on the note personally, and he approved the loan with his initials, "TVK." Kruckel had no basis to believe that Roberts owned Groovy nor that the listing of Groovy as collateral on Roberts' loan rendered any security in favor of the bank on this loan to an unemployed car salesman. No security agreement was executed, nor was there any hypothecation agreement under which Groovy was dedicated as security by Kruckel or any third party.

On these points, Kruckel's Executive Secretary, Saundra Hawkins, corroborated Roberts' testimony. She and Kruckel enjoyed a close confidential relationship and worked essentially side-by-side at the bank. She also believed Groovy belonged to Kruckel, as she paid Kruckel's bills for Groovy and other horses Kruckel had purchased, from Kruckel's account. Kruckel had frequent horse dealings, buying horses from LiButti, including Groovy, Gracefully Yours and Cutlass Reality.

Saundra Hawkins, who testified under a grant of immunity known to the jury, confirmed that Kruckel prepared substantial portions of the Roberts promissory note (Ex. G-816) himself, including information about Roberts and the naming of "Groovy" as collateral. She too understood that Kruckel, not Roberts, owned "Groovy."

Hawkins testified that she typed the two checks payable to Roberts as the loan proceeds in the amounts of $750,000 and $500,000 (Exs. 901A & 901B), which she had to type and sign because the amounts were too big for the checkwriter machine.

James Roberts testified that Mr. Kruckel then asked him to endorse the checks, which he did. The checks as negotiated both bore the inscription on the reverse side over Roberts' endorsement: "Pay to Buck Chance Stable," and both checks were deposited on September 15th to the Buck Chance Stable account at UNB. Buck Chance Stable is a LiButti entity, and the deposit of the $1.25 million to this account generated substantial new cash for LiButti without charging LiButti's burgeoning line of credit with another loan. It is undisputed that Roberts received no direct proceeds from this loan, and neither he nor LiButti ever made repayment upon the loan's principal. Roberts testified that Kruckel and LiButti both understood that Roberts would not be responsible for repayment of the loan, despite being the nominal borrower.

Roberts testified that the notation "Pay to Buck Chance Stable" was not on the reverse side of the checks when he endorsed them. His signature nonetheless appears in the middle of the back of the checks, rather

than at the top, and the jury had reason to doubt Roberts' recollection on this point.

Saundra Hawkins testified at trial that as of September 15, 1986, she was unaware about the proceeds of the Roberts loan going to LiButti's Buck Chance Stable. She was impeached, however, by her contrary grand jury testimony in which she admitted on August 27, 1992 (G.J. Tr. at 43) that she knew that the proceeds went to Robert LiButti, not James Roberts. Hawkins had attempted to clarify a different aspect of her grand jury testimony in a letter of August 31, 1992 (Ex. G-125), professing a lack of recollection whether she in fact typed the checks and endorsements, but her letter made no such attempt to correct testimony about her understanding of the proceeds of the sale.[4] The jury thus had ample grounds for finding that Saundra Hawkins was well aware of the true purpose of the "Roberts" loan and that she prepared not just the checks but also the counter-endorsement to Buck Chance Stables, at Kruckel's direction.

Roberts testified that Kruckel, LiButti and he all knew this was a sham loan. Kruckel knew Roberts was unemployed on September 15th because Roberts made the comment to Kruckel that he found it amusing that he was an unemployed car salesman getting a million dollar loan, and Kruckel chuckled in response. Also, Roberts testified that he never told Kruckel that he needed the proceeds of the loan to start a Mercedes dealership, as

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[4] Saundra Hawkins had also previously admitted before the grand jury, on January 22, 1992, that although she didn't know who typed the Buck Chance Stable endorsement, "it could have been me." (G.J. Tr. 1/22/92 at 25.)

Kruckel later maintained when confronted by his own Board of Directors (discussed below). The purpose of the loan, as Kruckel and LiButti both well knew, according to Roberts, was to sign a note to enable LiButti overdrafts to be covered before the bank examiners came, temporarily solving problems for both LiButti and Kruckel arising from overextensions of credit by Kruckel to his close friend LiButti and LiButti family members and entities.[5] Roberts also testified he saw Kruckel hand LiButti a check during the September 15th transaction.

On September 15th, Roberts was a stranger to the Bank. He had no account at UNB, had never been its customer, and filed no application for the $1.25 million commercial loan. Kruckel did not ask for, nor did he know, any information about the phantom Mercedes dealership Roberts was supposed to be purchasing. There was no description of the business being purchased, no financial statements or projections, no credit history or confirmatory information, and no tax return information for Roberts or anyone else. Unlike every other commercial loan in the bank's portfolio, and every other commercial loan discussed at trial, there was no write-up, documentation or paper of any sort (other than the Promissory Note itself) which supported this extraordinary loan, which was one of the ten largest in the history of the modest-sized UNB at that time according to the evidence.

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[5] In fact, by the close of business on September 15th, most of the Roberts loan proceeds, which had been deposited into the LiButti "Buck Chance Stable" account, had left the bank rather than even being used to pay down LiButti's loans.

After the loan was made, according to Roberts, Kruckel asked him to open a UNB account because it "would look better" if Roberts were a customer of the bank. Roberts later did so, depositing $80,000 into a new UNB account, which was most of the proceeds from Roberts' sale of a house in Massachusetts, which he had then loaned to LiButti and for which LiButti paid him back in gambling chips.[6]

When the loan was unpaid,[7] Kruckel and Hawkins prepared a new promissory note dated December 15, 1986 (Ex. G-817A), in Roberts' name, again listing Groovy as collateral. Roberts testified that Kruckel called him in December, 1986, to come to the bank to sign this renewal note, which he did.

In April, 1987, Kruckel called Roberts again about renewing the note and told him he was sending him another renewal in the mail. In an envelope addressed to Roberts postmarked April 29, 1987 (Ex. G-821C), Kruckel sent Roberts a second renewal note, backdated to December 15, 1986 (Ex. G-817B). This "December 15th" note was the same in all particulars, except that Groovy was no longer listed as collateral. Hawkins confirmed that

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[6] The account was opened on September 17, 1986, with an $80,000 check to Roberts from Trump Plaza. (Ex. D-1212). Roberts testified that LiButti gave him $80,000 in chips at the casino to repay Roberts for the loan of money derived from Roberts' Massachusetts house sale.

[7] LiButti had paid the interest on the original loan, however, because on December 10, 1986, Roberts received a note from the UNB's Delores "Cookie" Berger (Ex. G-1004) enclosing a deposit ticket, with her explanation, "Enclosed is the deposit Bob [LiButti] made to cover interest in your account. . . . "

Kruckel approved the alias December 15, 1986 note (Ex. G-817B). Roberts testified he was reluctant to sign such a note because it would leave him personally more exposed, but that LiButti assured him he talked to Kruckel and that he shouldn't be concerned, so he did so. Hawkins testified that the second December 15th note was prepared by Kruckel because of concern that the OCC in early 1987 would detect the loans to LiButti exceeding the bank's lending limit to affiliated individuals.[8] The second December 15th note not listing Groovy

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[8] According to National Bank Examiner Thomas Gallagher of the Office of the Comptroller of the Currency (OCC), the OCC's criticism of UNB's lending practices started in the Spring of 1986, when he led the audit team at UNB looking into the UNB's financial situation as of December 31, 1985, assisted by six others. He told Kruckel during the audit, which concluded on May 8, 1986, that the OCC had to combine the loan balances for Robert LiButti, Joan (his wife) and Buck Chance Stables, because Joan had no independent source of income. Kruckel told him that she did have income and that the bank would augment the records with her financial statements, but they never did.

The legal lending limit of a national bank under 12 U.S.C. § 84 is the maximum amount a bank can lend to one obligor or group. This limit equals fifteen percent (15%) of the bank's unimpaired surplus. The purpose of this limitation is to protect depositors and shareholders by assuring banks are spreading risks, according to Examiner Gallagher.

Kruckel and UNB had violated this limit, according to Gallagher, because Robert and Joan LiButti and Buck Chance had $2.5 million in loans outstanding as of December 31, 1985. The legal lending limit for UNB at that time was approximately $1.5 million, since the bank's net capital and unimpaired surplus was $9,390,000. The violation would have been even more grave if loans to Edith LiButti (daughter of Robert and Joan) has been included.

was not even found in the Roberts loan file, but rather in a different part of the bank according to bank examiner Edward Shaskin.

From the evidence, the jury could well infer that the backdated December 15, 1986 promissory note, eliminating "Groovy" as collateral, was part of the attempt by Kruckel to conceal from bank auditors and from his Board of Directors the existence and true purposes of the loan because Kruckel knew it to be improper.

The jury had sufficient evidence to conclude that defendant Kruckel had a motive to conceal the Roberts loan from the Board of Directors. If the Board had received a loan packet or writeup as was customary for all other commercial loans, the Board would have seen that Roberts had no employment, that there was no Mercedes dealership purchase agreement to finance, and that Kruckel disbursed on a loan in which Kruckel's own horse, "Groovy," was pledged as a collateral. The Board's questions about such an improper and extraordinary loan would have led to its disapproval by the Board, and to the Board's discovery that the proceeds went to LiButti, thus aggravating the Bank's lending limit violations with the LiButti line which the OCC had emphatically brought to the Board's attention at a meeting with the Board of

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Gallagher presented the OCC's findings regarding the LiButti lending limit violations to Kruckel and senior management at the exit interview on May 10, 1986, and to the entire Board of Directors on June 10, 1986. The OCC did so in order to assure that the Board of Directors was aware that UNB had committed unsafe or unsound banking practices.

Directors on June 10, 1986,[9] just three months before the bogus loan to Roberts for LiButti. The OCC reinforced its concerns about the LiButti line in a letter to the Board dated August 12, 1986 (Ex. G-117), just one month before the "Roberts" loan.

The jury's verdict that the defendant Kruckel made the Roberts loan without authority from the Board of Directors or the Executive Committee is supported by sufficient evidence. At UNB, the original 1962 bylaws of the bank granted the Executive Committee equal power with the Board of Directors to approve loans. (Ex. D-1C.) On October 14, 1974, the Board's minutes reflect a resolution that the Executive Committee has the authority to loan money to the same extent as the Board, Ex. D13, as explained by Edward O'Connor, who was a Member of the Board for 25 years and also a member of the Executive Committee at all relevant times. Thus the approval of a loan submitted to the Executive Committee in a proper format under the bank's procedures would be the equivalent of approval by the Board. After the LiButti-related loans went bad in the Spring of 1987, the Board passed a remedial resolution on May 12, 1987, making clear that all loans exceeding $500,000 (unsecured) or $600,000 (secured) had to be approved by the Board, and not by its Executive Committee. There is no dispute that Kruckel, as the bank's president, lacked authority at all times to give final approval for a loan of $1,250,000. His written lending authority was $100,000 for unsecured loans. At best, according to defendant's view of the bank's practices, Kruckel believed he could give initial approval of such a

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[9] See n. 8, *supra*.

loan and authorize disbursement of funds subject to presenting the loan for final approval to the Board, and there are several instances of the Board giving final approval to such loans after large disbursements were made. In fact, there is no evidence that the Board or the Executive Committee rejected a Kruckel-approved loan when the loan was documented and presented in the usual manner.

The agendas and minutes of the monthly Board of Directors meetings immediately before and after the Roberts loan make no mention of the loan, and there was no presentation and discussion of the Roberts loan at those meetings according to the two trial witnesses who attended, namely, Edward O'Connor and Bryant Malcolm. The bank's practice for considering a $1 million loan, according to Mr. Malcolm, consisted of the presentation of the loan by a bank officer, the submission of a loan packet, including a write-up on the corporate or individual borrower, plus a personal or corporate financial statement, an assessment of the borrower's standing in the community, and a statement of the purpose of the loan. Large commercial loans appeared in the minutes under "Other Loan Requests," which is where the Roberts loan should have appeared. The Board spent most of its meeting time discussing and deciding upon new loans, according to Malcolm, who had been a Board member since 1974. The Executive Committee also could act upon such loans in 1986 with the same authority as the Board, according to O'Connor, and an officer would present the loan to the Executive Committee accompanied by background information and discussions before taking action.

According to Mr. O'Connor, officers such as defendant Kruckel had approval authority up to $100,000

(unsecured) and $150,000 (secured) without any further action being necessary. Such smaller loans would simply be listed for the Board's information on the "New and Renewal Loan List," which was comprised of loans already approved within the authority of an officer or other bank employee or loan committee. For larger loans, however, the Executive Committee would receive the loan packet and a presentation by an officer sponsoring the loan, after which there would be discussion and a vote. In the history of UNB, there had been very few loans of the $1 million magnitude in 1985-87 at UNB, according to both Malcolm and O'Connor, and consideration of such a loan by the members of the Board or Executive Committee would be noteworthy because of the scrutiny. This scrutiny was especially true for a loan of $1.25 million because that figure approaches UNB's lending limit to a single borrower at that time.

Both Malcolm and O'Connor insist that defendant Kruckel never presented the Roberts loan for approval of the Board or Executive Committee, either before or after the proceeds were disbursed.

In fact, in April 1987, when the bank's auditors uncovered the Roberts loan and brought it to the Board's attention in the letter of UNB's internal auditors dated February 16, 1987 (Ex. G-805 – the "Radics letter"), every single member of the Board – including the entire Executive Committee – expressed surprise because they emphatically had never even heard of Roberts, let alone the Roberts loan of the previous September. The unanimous Board (except for Peter McBride, who was not present) wrote a response on April 15, 1987 to Kruckel after they received the Radics report demanding an

explanation for Kruckel's failure to have presented the Roberts loan for approval. Signatories included the late J. Nevins McBride, who was Chairman of the Board and defendant Kruckel's own father-in-law, demanding Kruckel to appear before the Board at a special meeting on April 23, 1987 at 5:00 P.M., and directing Kruckel to bring all documentation, according to O'Connor and Malcolm.

Kruckel brought no loan files to the meeting, according to O'Connor and Malcolm. (Of course, with respect to the Roberts loan, there was no file to bring other than just the promissory notes.) They testified that Kruckel said the Roberts loan was to advance money to purchase a Mercedes agency on Long Island. Malcolm also said Kruckel told the Board that Roberts was a friend of his, and he made no mention of any connection to LiButti, whose name had by then become anathema due to increasing loan defaults and overdrafts in large sums outlined in the Radics auditors' report. O'Connor and Malcolm both clearly recalled that Kruckel admitted he had not presented the loan for approval.

After the meeting was over, according to Malcolm's testimony, Kruckel drove Malcolm home and when they arrived in Kruckel's car, Kruckel said, "I'm sorry. I have been under pressure lately. I know this loan should have gone before the Board, and this won't happen again."

By the time of the next Board meeting, the members had learned that the Roberts loan was not used to purchase a Mercedes Benz agency as Mr. Kruckel had said, and they confronted Kruckel again. This time, according to Malcolm, defendant Kruckel said, "Guys, I had to tell

you something to get you off my back." Malcolm interpreted Kruckel's earlier explanation, in light of this admission and the discovery about Roberts being unemployed and without plans to purchase a car dealership, as a deception. All of the above is compelling evidence that Kruckel knew he made the Roberts loan without authority of the Executive Committee or of the Board of Directors, whether before or after he authorized UNB's checks to be issued to Roberts and deposited for LiButti's benefit.

In his attempt to undermine this overwhelming evidence that Kruckel knew he made the Roberts loan without authority and that the bank would be injured or defrauded by his issuing of the proceeds for LiButti's use, defendant seizes upon the listing of the Roberts loan in the Executive Committee's records of its meeting September 24, 1986, which was nine days after the Roberts loan was disbursed. The "New and Renewal Loan Report" for the period ending September 22, 1986 lists the Roberts loan at $1,250,000, originating September 15, 1986, with maturity December 15, 1986. (Ex. G-108I.) The minutes of the meeting of September 27, 1986, recite that "approval was granted for loans made by officers since the previous meeting and loans previously approved were read for information." The minutes of the next Board meeting on October 14, 1986, then recited the boilerplate that the minutes of the Executive Committee held September 24, 1986 were approved, with no indication, however, that any documents pertaining to the routine "New and Renewal Loan Report" were given to the Board.

The jury could properly disregard the minute entries because of the fraudulent circumstances in which Kruckel

issued the loan process, Kruckel's acquiescence in the unanimous consensus of the Board that Kruckel never presented the Roberts loan for approval as required, and his statements that he was sorry for this breach of authority and for the deception he had engaged in. The jury could have well found that the irregularity of burying the Roberts loan in the three-page listing of routine "New and Renewal Loan Report" (Ex. G-108I) was evidence of Kruckel's efforts to hide this loan from scrutiny. The "New and Renewal Loan" listing is not the proper place for new commercial loans of $1.25 million in the bank's practices and procedures, as defendant Kruckel well knew with regard to the Roberts loan.

David Van Lenten, a senior vice president in charge of mortgage lending and real estate loans, testified that he attended directors' and executive committee meetings routinely for many years. He recalled Kruckel or himself presenting many of the LiButti-related loans in this case to the Executive Committee or Board, but he had no recollection of the Roberts loan being presented, discussed or approved. He testified he first became aware of the Roberts loan when reviewing large loans on file in the bank as part of a new Loan Review Committee. Kruckel had told him that the purpose of the Loan Review Committee was to get files in order for larger loans, when in fact the Board had set up the special Loan Review Committee in the Fall of 1986 in response to the OCC criticism on lending limits. Mr. Van Lenten, in reviewing the Roberts loan, testified that he assumed it had been approved by the Board because the file had background information and critiques prepared in advance of a meeting of the sort that the loan officer who made the loan

would use in order to present the loan and respond to questions. His testimony was impeached, however, by his grand jury testimony that when he discovered the Roberts loan, it had no background information. Kruckel told Van Lenten in November, 1986 that the Roberts loan was to buy a horse, and Van Lenten testified that although he noticed Mr. Kruckel's horse "Groovy" was used as collateral, he raised no question about it. The jury may well have found this aspect, and others, of Mr. Van Lenten's testimony incredible. Van Lenten also admitted that the standard practice for presenting a large commercial loan to the Executive Committee involved a complete loan packet (such as Ex. G-108C, involving a loan to Accounting Dynamics as an example) including a write-up for the corporate loan, two individual guarantees, security collateralizing the loan evidenced by the standard UCC-1 form and a security agreement in the receivables of the corporation. (See also Ex. G-107I for packet of extensive documentation prior to Executive Committee's approval of extension of credit to GSO Graphics). In such instances of major commercial loans, the evidence amply supports the finding that the approval process was intentionally disregarded by Mr. Kruckel in connection with the Roberts loan.

Nothing herein detracts from the observation of National Bank Examiner Shaskin that banks can permissibly function by Executive Committees or Boards of Directors ratifying the loans made by officers of the bank, even including loans that may have exceeded the officer's lending authority when the officer made them. Thus, it would not necessarily have been a violation of section 1005 if Mr. Kruckel had merely sought and received after-

the-fact authorization for the Roberts loan in the ordinary course, disclosing all material facts and circumstances, from either the Executive Committee or the Board. He never sought such ratification under the bank's clear and consistent procedures for large commercial loans, namely, by presenting a well-documented loan packet to the Executive Committee or to the full Board, as he acknowledged. He instead buried the undocumented loan in a long listing of routine officer-approved loans on the "New and Renewal Loan List," rather than in the requisite format of specific and individualized presentation of loan packets for consideration, review and discussion. This was easy for Mr. Kruckel to do, since he essentially controlled the agendas and minutes, which were then typed by Saundra Hawkins and maintained in Kruckel's office. As Kruckel acknowledged in April and May of 1987, and as every member of the Board knew and realized, Kruckel intentionally failed to seek or obtain proper authorization for the Roberts loan. He knew it, the Executive Committee and Board members knew it, and the jury so found.

Defendant posits the argument that he could not be convicted because he had a good faith belief that his actions in approving and disbursing the Roberts loan without subsequent ratification were authorized by the pattern and practice of UNB authorization for his loans. Defendant notes that an officer of a bank does not act knowingly or wilfully if he has a good faith belief that his loan disbursement is authorized. This court instructed the jury, essentially as requested by defendant,[10] that "[t]he good faith of a defendant is a complete defense to

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[10] See discussion in Part 3, below, pertaining to Instruction No. 52, "The Good Faith Defense."

each of the charges in the indictment because good faith on the part of the defendant is, simply, inconsistent with the intent to 'injure and defraud' or the making of a knowingly and wilfully false statement or false entry, as alleged in the indictment." The jury was carefully instructed that if the defendant honestly believed his actions were authorized, he could not be convicted even if he were incorrect:

> A person who acts, or causes another to act, on a belief or an opinion honestly held is not punishable under this statute merely because the belief or opinion turns out to be inaccurate, incorrect or wrong. An honest mistake in judgment or an error in management does not rise to the level of intent to defraud. . . .

Instruction No. 52. Mr. Kruckel thus argues that because he had granted and disbursed loans exceeding his lending authority in the past which were subsequently ratified by the Executive Committee or the Board of Directors, that he enjoyed such authority to make the Roberts loan even though the members of the Board later disagreed with him. He alleges the Board changed its policy without telling him that it would not ratify such loans in the future.

There was ample evidence that the jury found that defendant Kruckel lacked such a good faith belief with respect to the Roberts loan, and that his self-authorization of that loan was not an honest mistake but a knowing and willful act to defraud the bank. First, unlike every other commercial loan in this case, Mr. Kruckel failed to obtain any financial back-up information. Second, Roberts was not a customer of the bank, and this was one of but a

handful of loans to borrowers outside of New Jersey. Third, there were so few loans of this size in the history of UNB by 1986 that Mr. Kruckel could not have thought an undocumented loan to an out-of-state non-customer for an ill-defined purpose could have ever received after-the-fact ratification of the Executive Committee or Board. Fourth, in accepting collateral – "Groovy" – that did not belong to the borrower and failing to take steps necessary to secure the bank's position, Mr. Kruckel approved a loan without precedent in the record. Fifth, in issuing a backdated second renewal note of December 15, 1986, and maintaining that note – which deleted "Groovy" as security – in a separate file, Mr. Kruckel continued his efforts to injure or defraud the bank, again without precedent in the banks' files. Sixth, in disbursing loan proceeds to LiButti, rather than to Roberts, Kruckel was motivated by the desire to conceal from the Board the true nature of the loan, which was a method to give cash to LiButti beyond the lending limits of the Bank; while there can be innocent instances of loan proceeds being paid to someone other than the borrower, this effort in Roberts' case was to divert attention from the actual purpose. Finally, nothing defendant Kruckel said or did after-the-fact is consistent with his alleged good faith belief – he admitted he knew he should have presented the loan and he admitted he deceived his own Board, saying "I had to tell you something to get you off my back" – when they confronted him. From all of this the jury had ample reason to reject the "good faith" defense and to find that the Government proved defendant Kruckel, in issuing the UNB's checks as proceeds of the bogus Roberts loan without approval by the Board or the Executive Committee,

whether before or after the fact, acted knowingly and with intent to defraud or injure the bank, beyond a reasonable doubt.

Accordingly, defendant Kruckel's motion to set aside his conviction on Count 9 for lack of sufficient evidence will be denied.

3. Defendant's Argument that the Jury Instructions Regarding "Reckless Disregard" Were Erroneously Applied by the Jury as to Count 9

Defendant Kruckel propounds an argument that the jury erroneously applied instructions regarding "reckless disregard" in reaching its verdict on Count 9. "Reckless disregard" instructions are contained in the jury charge at two points (pp. 58 and 62), neither of which relate to Count 9.[11] The oral charge was reinforced in the complete verbatim written version given to the jury at the commencement of deliberations. Defendant Kruckel contends (a) that no "reckless disregard" charges should have been contained in the instructions; and (b) that he is entitled to a new trial on Count 9 because although the "reckless disregard" charges were given only as to Counts 4, 8 and 11 (counts upon which Mr. Kruckel was acquitted), the jury erroneously applied those instructions in reaching its verdict as to Count 9. This latter argument is based upon the fact that the jury raised a question during the course of its deliberations to which the court responded in a manner which the defendant contends misled the jury

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[11] The jury charge clearly indicates which counts are covered by each individual instruction.

into believing it could convict Mr. Kruckel for "recklessly disregarding" the interests of UNB on a charge (Count 9) for which defendant contends reckless disregard was insufficient for conviction.

First and foremost, the court's instructions to the jury on Count 9 were proper, and the defendant made no objection to them. Count 9, along with Counts 2 and 5, alleged violations of section 1005 by issuing checks without proper authorization. These section 1005 charges were addressed in Instructions 34 and 35 (Jury Instructions, filed October 14, 1993 at pp. 51-52).

Instruction 34 stated as follows:

> Counts 2, 5 and 9 of the Indictment charge the defendant being an officer and director of UNB, with knowingly and wilfully, without authority from the directors of UNB, issuing various cashier's checks, namely a $500,000 cashier's check to Robert Libutti (Count 2), six cashiers checks, which constituted the proceeds of the Ballis loan (Count 5), and two cashiers checks, which constituted the proceeds of the Roberts loan (Count 9), all with intent to injure or defraud Urban National Bank. Such an offense is a crime under Title 18, United States Code, Section 1005, which provides:
>
> > whoever, without such authority, makes, draws, issues, puts forth, or assigns any certificate of deposit, draft, order, bill or exchange, acceptance, note, debenture, bond, or other obligations, or mortgage, judgement or decree . . . shall be guilty of an offense against the United States.

Charge 35 correctly stated the elements of a section 1005 charge for issuing checks without proper authorization, as follows:

> In order to find a defendant guilty of an offense under this clause of Section 1005, you must find that the United States has proven the following three elements beyond a reasonable doubt.
>
> *First*: that the defendant issued a draft, order, bill of exchange or other obligation of the Bank;
>
> *Second*: That the defendant did so without the authority of the Board of Directors;
>
> *Third*: That the defendant did so knowingly and wilfully with intent to injure or defraud the bank.
>
> I instruct you further that a cashier's check as alleged in Counts 2, 5, and 9 is a bill of exchange or other obligation of the bank within the statute. Further, you must consider each charge in Counts 2, 5 and 9 separately in arriving at your verdicts.

The court likewise correctly instructed the jury regarding the requirements of acting "knowingly" and "willfully" with a specific intent to violate the law, in Instruction 21, which stated:

> All of the crimes charged in the Indictment have as one of their essential elements the requirement that the defendant acted "knowingly" and "willfully."
>
> An act is done "knowingly" if done voluntarily and intentionally, and not because of mistake, accident, oversight or other innocent reason.

> The purpose of adding the word "knowingly" is to ensure and require that no one will be convicted for an act done because of mistake, accident, oversight or some other innocent reason, such as a good faith belief that they had the authority to take particular action(s).
>
> An act is done "willfully" if done voluntarily and intentionally, and requires the specific intent to do something the law forbids; that is to say, with bad purpose and intent to disobey or to disregard the law.

Thus, these instructions nowhere indicated that an intent to "recklessly disregard" the bank's interests was sufficient to show "intent to injure or defraud" the bank on Count 9.

Defendant Kruckel is simply incorrect to assert that the jury instructions as delivered by the court at the close of the case were erroneous. The thrust of Kruckel's argument on this initial point is that the "reckless disregard" instruction given in *another* instance – on Count 11, which charged the defendant with misapplication of bank funds in violation of 18 U.S.C. § 656[12] – was improper.[13] As the

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[12] 18 U.S.C. § 656 as effective at the time relevant to the indictment provided in pertinent part:

> Whoever being an officer, director, agent, or employee of or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, . . . willfully misapplies any of the moneys, funds or credits of such bank . . .

shall be guilty of an offense against the United States.

[13] The jury charge on Count 11 given in Instruction 41 (Misapplication of Bank Funds – Elements) provided in its entirety:

court determined during the charge conference, Third

In order to find a defendant guilty of misapplication of bank funds, you must find that the United States has proven the following five elements beyond a reasonable doubt:

One: the defendant was an officer, director, or employee of Urban National Bank;

Two: that the bank was a Federal Reserve bank, member bank, national bank or insured bank;

Three: that the defendant wilfully misapplied the monies, funds or credits to the bank;

Four: that the defendant did so with the intent to injure or defraud the bank; and

Five: the amount misapplied was more than $100,000.

The phrase "willfully misapplies" means the unauthorized or unjustifiable or wrongful use of the monies, funds or credits of the bank. Willful misapplication occurs when a bank officer converts bank funds, credits, or moneys for unjustifiable or wrongful use. It is not necessary that the bank officer convert the funds to his own use of benefit. You may consider the lack of benefit, if any, in arriving at your decision.

The phrase "with intent to injure or defraud the bank" means to act knowingly and with the intent to deceive or to cheat the bank – ordinarily for the purpose of either causing a financial gain or a financial loss to someone or something.

Intent to injure or defraud a bank exists whenever the defendant acts knowingly and the result of his conduct would be to injure or defraud the bank, regardless of his motive. Such intent may be inferred from facts and circumstances. Reckless disregard of the interests of the bank is equivalent to intent to injure or defraud. Mistake or accident or other negligence is not sufficient to support a finding of an intent to injure or defraud. It is not necessary that the

Circuit precedent supports the instruction even on Count 11, which is not the charge of conviction here.

In *United States v. Schoenhut*, 576 F.2d 1010 (3d Cir.), *cert. denied*, 439 U.S. 964 (1978), the Court discussed the requirements for a proper conviction under § 656:

> To sustain a conviction of willful misapplication of bank funds under section 656, the Government must prove (1) that the defendant was an officer, (2) of a federally connected bank, (3) who willfully misapplied funds at the bank, and (4) that he made the misapplication with the intent to injure and defraud the bank. Intent to injure or defraud a bank exists whenever the defendant acts knowingly and the result of his conduct would be to injure or defraud the bank, regardless of his motive. Such intent may be inferred from facts and circumstances shown at trial and is basically a fact question for the jury. *Reckless disregard of the interests of the bank is equivalent to intent to injure or defraud.*

Id. at 1024 (footnote and citations omitted) (emphasis supplied). *See also United States v. Krepps*, 605 F.2d 101, 104 (3d Cir. 1979) (" 'reckless disregard of the interests of the bank is equivalent to intent to injure or defraud' ") (quoting *Schoenhut*); *United States v. Thomas*, 610 F.2d 1166, 1174 (3d Cir. 1979) (quoting *Schoenhut*). Thus the instruction on Count 11, which charged willful misapplication of bank funds in violation of § 656, was in accordance with the law of this Circuit.

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evidence in the case establish that the bank suffered an actual injury.

In any event, because the defendant was acquitted on Count 11, the discussion of this section of the jury charge would be unnecessary but for an issue which arose on October 15, 1993. The jury submitted a question to the court which read as follows:

> *Re: Count 9*
>
> Reads in part "with intent to injure *and* defraud UNB." Definition of "Reckless disregard" pg. 62 jury instructions reads in part "is equivalent to intent to injure *or* defraud." Can we have a clarification on these different phrases?

By this note, the jury was indicating that it sought clarification of why the indictment language is framed in the conjunctive "injure *and* defraud" while the language of the court's instructions contained the language "injure *or* defraud," *see* Jury Question No. 3 (emphasis in original note). I noted this upon the record of discussions with counsel during the conference in chambers that considered Question No. 3:

> . . . I've discussed [the note] with counsel, researched the cases, and have determined that the jury is asking for more guidance to explain the difference between the charging language on Count Nine, which speaks of intent to injure *and* defraud the bank on the one hand, and the explanatory language in the jury instructions at page. 62, which instructs the jury regarding intent to injure *or* defraud. And since the jury has double or triple underlined the words and/or, that I've interpreted their note as seeking an explanation between the conjunctive, the conjunctive indictment and the disjunctive jury instruction, and I would propose to respond to

> it in the following way guided by the precedents of *United States versus Cusumano*, 943 F.2d, 305 at 311, Third Circuit, 1991 as well as a host of other authorities, including *United States versus Hathaway*, 798 F.2nd, 902, Sixth Circuit, 1986 at page 912; *United States versus Fontana*, 948 F.2nd, 796 First Circuit, 1991 at page 801 and others. [Tr. 10/15/93 at 2:7-23.]

Therefore, the court responded with a note that read:

> TO THE JURY:
>
> In response to your third question (copy attached) please be advised with respect to Count 9 as follows:
>
> Where an Indictment alleges that a defendant acted with intent to injure and defraud a financial institution, the Government must prove beyond a reasonable doubt that the defendant acted either with intent to injure the financial institution or with intent to defraud the financial institution. Therefore, you must apply the law as I have instructed in pages 61 and 62 of the Jury Instructions, noting that the fourth essential element is satisfied if the Government proves beyond a reasonable doubt that the defendant did so with the intent to injure the bank or with the intent to defraud the bank.

The court's note as originally drafted did not contain a reference to Count 9, as reflected in the discussions between counsel and court regarding an appropriate response to the jury's note. (Tr. 10/15/93 at 2:24 to 3:10.) After counsel for the defense put his objection on the record regarding the note (which at that time did not

contain the Count 9 reference) and proposed an alternative response to the jurors' question,[14] defense counsel

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[14] Mr. Plaisted's proposed response to the jury's note was an answer that would "key them" to Count 9, and which would inject the notion of reckless disregard as an element for their consideration on Count 9, even though the Count 9 charge contained no reckless disregard language. Mr. Plaisted thus suggested the following language to respond to his perception of the jury's concerns, which in his view far transcended the conjunctive/disjunctive "and/or" issue:

> In order to convict under Count Nine you must find a criminal intent to defraud the financial institution, that is the bank in this case. Ordinarily, that intent to defraud is accompanied by a desire or a purpose to bring about some gain or benefit to one's self or by a desire to cause some loss to some person. Whether there was reckless disregard is simply a factor you may consider in assessing whether there is such a criminal intent to defraud the financial institution. You still must find that there was such a criminal intent to defraud, period. That would be the end of what I would ask be given. The reason, I ask it is because not that I want to reemphasize the reckless disregard charge which I did object to, but rather I want to make clear in light of their reference to it, the reckless disregard is not a substitute for finding a criminal intent to defraud the financial institution. So, thank you, Your Honor.

Tr. I 10/15/93 at 3:25 to 4:15.

As was apparent from the jury instructions on Count 9, there was no reference to reckless disregard, so the court did not interpret the jury as raising an issue about whether intent to recklessly disregard the bank's interests was equivalent to intent to injure or defraud the bank. Therefore the court declined to adopt Mr. Plaisted's proposed language regarding reckless disregard in Count 9. I stated:

> I'm going to give the response that I've indicated. If it turns out that the jury means to be asking some ques-

suggested off the record, and the government agreed, that the court add the phrase "with respect to Count 9" in the note. The court made note of defense counsel's request upon the record later that day. (Tr. II, 10/15/93 at 2:1-20.)[15] This was not accurate, because the jury instructions at pages 61 and 62 related to Count 11 and not to

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> tion about reckless disregard, which I don't interpret their present question to be doing, then, of course, they know how to send me a note and they'll do so and then we'll respond in more detail. But all the charging language in pages 61 and 62 is correct, and simply to refer them to it I think is the proper solution.

Tr. I 10/15/93 at 4:22 to 5:4.

[15] After the jury returned its verdict and was discharged, the following colloquy took place when the court noticed the inaccurate insertion of reference to Count 9:

> THE COURT: Okay, be seated. The jury's note bore the inscription Re: Count IX in the upper left-hand corner.
>
> MR. PLAISTED: Right.
>
> THE COURT: And then they said that it reads in part with intent to injure and defraud UNB, and they inquired about the language of reckless disregard on page 62 of the jury instructions which reads in part, "is equivalent to intent to injure or defraud," and so they asked for a clarification of these different phrases, meaning the difference between the charging language of "and", and the instructions language of "or". And I gave the response indicated in my note as we placed on the record in chambers. Then as we were leaving chambers, but it wasn't on the record, it was my impression that all counsel said that I should include reference to Count IX in my note which hadn't been there before.
>
> MR. PLAISTED: If it's not on the record, there's no question about it, I was one of the people and I may have been the first to suggest it, because

IN THE CIRCUIT COURT FOR
WASHINGTON COUNTY, MARYLAND

EX PARTE IN THE MATTER OF THE PETITION OF THE WASHINGTON COUNTY DEPARTMENT OF SOCIAL SERVICES FOR GUARDIANSHIP WITH RIGHT TO CONSENT TO ADOPTION AND/OR LONG-TERM CARE SHORT OF ADOPTION	*	2633 ADOPTION
MICHAEL MAUK AND SYLVIA MAUK INTERVENORS/COUNTER-PLAINTIFFS	*	
V.	*	
DAVID A. ENGLE, DIRECTOR, WASHINGTON COUNTY DEPARTMENT OF SOCIAL SERVICES PETITIONER/COUNTER-DEFENDANT	*	

MEMORANDUM OPINION AND ORDER OF COURT

Michael and Sylvia Mauk, as Intervenors/Counter Plaintiffs, seek to challenge the decisions of the Defendant, David A. Engle, Director of the Washington County Department of Social Services, in removing Tiffany R a foster child, from their foster care and placing her in the foster care of another couple preparatory to her adoption. The Mauks seek an interlocutory injunction pending this litigation in which the Mauks challenge the alleged racial discriminatory policies of the Washington County

words "with respect to Count 9," discussed above. Without that insertion, the court's response would have been accurate and responsive to the jury's question about the phrasing of Count 11 at page 62 of the Jury Instructions. Where the ambiguity or error was injected by defense counsel himself, although acquiesced by the judge, the defendant is prohibited from challenging such an alleged error invited or induced by himself. *United States v. Lewis*, 524 F.2d 991, 992 (5th Cir. 1975), *cert. denied*, 425 U.S. 938 (1976), *quoted in United States v. Riccobene*, 709 F.2d 214, 228 (3d Cir. 1983).

Third, assuming for the moment that defendant Kruckel's fears arising out of the reference to Count 9 in the court's response to the jury's October 15, 1993 question are valid, and that the jury did refer to pages 61 and 62 of the jury instructions containing the "reckless disregard" instruction (regarding Count 11) in its deliberations on Count 9, the resulting prejudice to defendant would not be sufficient to require a new trial on Count 9. Defendant's concern is that the jury convicted on a theory of intent which was insufficient to support a conviction under 18 U.S.C. § 1005 for issuing checks without proper authorization.[16] Defendant is correct that, although not expressly mentioned in the paragraph of the statute

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[16] 18 U.S.C. § 1005 provided in pertinent part at the time relevant to the indictment:

> whoever, without such authority, makes, draws, issues, puts forth, or assigns any certificate or deposit, draft, order, bill of exchange, acceptance, note debenture, bond, or other obligations, or mortgage, judgment or decree . . .

shall be guilty of an offense against the United States.

charged in Count 9, intent to injure or defraud is a required element of every offense described in § 1005. *See, e.g., United States v. Pollack,* 503 F.2d 87, 90 (9th Cir. 1974). The written and oral charges on Count 9 fully recognized this necessary element, as discussed above. However, defendant is not correct that courts which have considered whether instructions of the type defendant fears were applied to the § 1005 charge (through the reference in the court's note to Count 11's instructions at pages 61-62 while also indicating that the advice was "with respect to Count 9") in this case have been the basis of reversible error in other circuits.

Defendant relies on two cases in support of his argument that a "reckless disregard" instruction on a § 1005 charge so fails to meet the requirement that the defendant have acted with the intent to injure or defraud the financial institution that the giving of such an instruction constitutes reversible error. As the Government correctly points out, both cases cited by defendant, *United States v. McAnally,* 666 F.2d 1116 (7th Cir. 1981) and *United States v. Welliver,* 601 F.2d 203 (5th Cir. 1979), are distinguishable. A preliminary observation is that while defendant is literally correct to note that both cases arise out of the charging of the jury with a "reckless disregard" instruction on a § 1005 charge, both cases relate to a different paragraph of § 1005 than the paragraph under which defendant Kruckel was charged. 18 U.S.C. § 1005 makes criminal several distinct bank-related activities, one of which was charged in Count 9 (issuing checks without authority), and another of which was charged in each of the cases

They were responsive to the child's needs and provided a loving, engaging nurturing and warm environment for her.

Her pediatrician at first noticed the child's passivity, reticence and poor affect. He attributed the parental interactions (by the Mauks) in fostering and tutoring the child as contributing to the miraculous transformation.

Under the Mauks care, Tiffany, changed from being developmentally delayed to advanced for her age; she became a warm, loving child who was cared for and cared about. Over the year and a half period, the Mauks became her psychological parents and Keshia and Dustin became her psychological siblings. Tiffany and her two psychological siblings were accepted and loved by both parents and the grandparents. The Court found no evidence that the difference in race created any strangeness or prejudice based upon their racial difference.

TIFFANY'S BIOLOGICAL SIBLINGS

Tiffany's contact with her two brothers from age six months to approximately two years and three months was limited to approximately nineteen visits of several hours' duration between the three children while they had been in foster care.

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The S like the Mauks, are a couple well-suited and talented to be exemplary parents. The principal difference is racial, – the Mauks being white, the S black. Tiffany was removed from the Mauk home and placed in the S home with her biological siblings on March 31, 1992.

> of the bank a felony. It is unlikely that the statute was intended to go so far to protect banks and their customers from the misconduct of their officers. There must be at least a hundred thousand bank officers in this country, many of them, like McAnally, young and inexperienced employees of small and unsophisticated banks. These officers make in the aggregate millions of entries on the books of their banks every day; no doubt many of these entries are inaccurate, and many of the inaccuracies are probably due to negligence, some of it gross. We do not think Congress meant to expose all of these bank employees to felony prosecutions . . .

McAnally, 666 F.2d at 1119.

It is not the phrase "intent to injure or defraud" in and of itself which always requires an instruction of more than recklessness. Rather, the context of the "intent to injure or defraud" element is critical. The charge contained in Count 9 is distinguishable from charges regarding false entries because the defendant in the former circumstance must be found guilty of issuing checks both without authorization *and* with intent to injure or defraud. The holdings of *McAnally* and *Welliver* therefore do not apply by their terms to the issuance of bank checks without authorization, nor is it clear that their logic extends to the situation before the court.

But even beyond these important distinctions, the charge given on Count 11 which defendant speculates was erroneously applied by the jury to Count 9 contained critical protections not contained in the charges appealed from in *McAnally* and *Welliver*. The courts in *McAnally* and *Welliver* were not troubled by the idea that a finding

that reckless disregard of the interests of the bank was sufficient to support a finding of intent to injure or defraud, but rather they were troubled by the possibility that a jury hearing a "reckless disregard" charge of the type given might equate "reckless disregard" with gross negligence, which would be insufficient to support a finding of intent to injure or defraud, and that the jury may have improperly convicted on that basis. As the court explained in *Welliver*:

> We agree that "recklessness" may be a reasonable basis in some cases for punishing the making of a "false entry," such as where it appears that there has been a deliberate attempt to avoid knowing whether the entry is fraudulent or deceptive. However, it does not necessarily follow that in all cases proof of a specific intent to injure or defraud should be eliminated by a vague generalization equating recklessness with intent to defraud. When a trial judge in his instructions refers to "recklessness," no more is necessarily implied than such mere negligence, carelessness, thoughtlessness, or inadvertence as could not be regarded as the equivalent of an intentional wrong. We believe the instructions given by the trial judge was in error with respect to the alleged violations of § 1005. *The instruction should either have contained a definition of "recklessness" requiring that more than mere negligence, carelessness, thoughtlessness, or inadvertence be found before the entry could be found to have been made with an "intent to defraud," or it should have been made apparent to the jury that it did not have to find an intent to defraud merely because the defendant acted recklessly.*

Welliver, 601 F.2d at 210 (citations omitted) (emphasis added). The basis for the court's reversal in *McAnally* was an identical concern:

> The term "reckless" covers a broad range of meanings to lawyers, and probably an even broader one to laymen. In law it is sometimes used interchangeably with gross negligence; and in the absence of a *clarifying instruction* the jury might have so understood it here. If so, the jury may have seriously misunderstood the false-entry offense.

McAnally, 666 F.2d at 1119 (citations omitted) (emphasis added). In contrast to *Welliver* and *McAnally*, this danger was simply not present in defendant Kruckel's case, as the charge given on Count 11 included ample clarification. The jury was adequately cautioned against inferring that recklessness meant nothing more than negligence or carelessness, as the relevant charging language for Count 11 read as follows:

> . . . Intent to injure or defraud a bank exists whenever the defendant acts knowingly and the result of his conduct would be to injure or defraud the bank, regardless of his motive. Such intent may be inferred from facts and circumstances. *Reckless disregard of the interests of the bank is equivalent to intent to injure or defraud. Mistake or accident or other negligence is not sufficient to support a finding of an intent to injure or defraud.* It is not necessary that the evidence in the case establish that the bank suffered an actual injury.

Jury Instruction 41 (emphasis added). The jury was thus adequately cautioned against finding an intent to injure

and defraud where only negligence was proved. Further, the fact that the jury acquitted this defendant on Count 11 – as well as Counts 4 and 8, each of which were accompanied by "reckless disregard" instructions – is also evidence that this jury was able to heed the cautionary language that reckless disregard transcends mistake, accident or other negligence.

In sum, the court finds that the jury was properly instructed on Count 9, and that the alleged misinterpretation of the jury's note should not be permitted to convert defendant's objection to the Count 11 charge into an attack upon the basis for his conviction on Count 9. To the extent that defense counsel contributed to the incorrect reference to Count 9 in the court's responsive note, defendant is precluded from challenging this induced error. Even if the court assumes that defendant's concern that the court's note to the jury of October 15, 1993 might have caused the jury to apply the instructions regarding "reckless disregard" contained in Jury Instruction 41 concerning Count 11 in its deliberations on Count 9 – a theory which would require the jury to have disregarded the oral and written instructions on Count 9 as to which no objection was ever made – there is no basis upon which to grant defendant's motion for a new trial. Rule 33 of the Federal Rules of Criminal Procedure provides that a court may grant a new trial "if required in the interest of justice." The court concludes that the jury instructions taken as a whole were correct, that no miscarriage of justice occurred and that a new trial on this ground will be denied.

4. Defendant's Argument that the Court Failed to Give the Defense's Requested Instruction on Good Faith and that a New Trial is Required on this Ground

Defendant Kruckel next argues that the court failed to give the instruction requested by the defense regarding defendant Kruckel's good faith belief that he had the requisite authority to act as he did "as to Count 9," and that this failure to so instruct the jury mandates a new trial. In his brief, the defendant contends:

> The defense requested that the Court instruct the jury that if Ted Kruckel reasonably believed that if he had the authority to issue a loan such as the Roberts loan that would then be later ratified, they should acquit. That defense request as to the reasonable belief in authorization was denied. Instead, the jury was simply informed, as to this Count, that if the defendant acted without authority and knowingly and wilfully with intent to injure and defraud the bank he was guilty. In light of the substantial evidence that, in fact, Mr. Kruckel had a substantial basis to believe he was so authorized, that instruction was essential to the defense.

Def.Br. at 33.

The trial court is "bound to give the substance of a requested instruction relating to any defense theory in the evidence." *United States v. Blair*, 456 F.2d 514, 520 (3d Cir. 1972). It is not error, however, for the trial court to refuse to instruct as defense counsel wishes if the charge to the jury is correct as given. *Id.*

Here, defendant Kruckel argues that his good faith defense instruction was not given "as to Count 9." The

fact is that the substance of that instruction was given, per the request of the defendant, over strenuous objections by the United States, in Instruction No. 52 ("The Good Faith Defense") which pertained to *all* counts of the Indictment, including Count 9, and which contained the substance of the requested instruction concerning Count 9. Instruction No. 52 read:

> The good faith of a defendant is a complete defense to each of the charges in the indictment because good faith on the part of the defendant is, simply, inconsistent with the intent to "injure and defraud" or the making of a knowingly and wilfully false statement or false entry, as alleged in the indictment.
>
> A person who acts, or causes another person to act, on a belief or an opinion honestly held is not punishable under this statute merely because the belief or opinion turns out to be inaccurate, incorrect, or wrong. An honest mistake in judgment or an error in management does not rise to the level of intent to defraud.
>
> A defendant does not act in "good faith" if, even though he honestly holds a certain opinion or belief, that defendant also knowingly makes false or fraudulent pretenses, representations, or promises to others.
>
> The various fraud statutes at issue here apply only to those people who act knowingly and wilfully with intent to injure or defraud. The perjury and obstruction statutes at issue here apply only to those people who knowingly and wilfully give false statements under oath or knowingly and wilfully exhort others to do so.

> While the term "good faith" has no precise definition, it means, among other things, a belief or opinion honestly held, an absence or malice or ill will, and an intention to avoid taking unfair advantage of another.
>
> In determining whether or not the government has proven that the defendant acted with an intent to defraud or injure or whether the defendant acted in good faith, the jury must consider all of the evidence in the case bearing on the defendant's state of mind.
>
> The burden of proving good faith does not rest with the defendant because the defendant does not have any obligation to prove anything in this case. It is the government's burden to prove to you, beyond a reasonable doubt, each element of the offenses charged, including whether the defendant Theodore Kruckel acted with the intent to defraud or injure, or that his conduct was knowing and willful, or that he corruptly procured false testimony, as the case may be.
>
> If the evidence in the case as to any count leaves the jury with a reasonable doubt as to whether the defendant acted with such an intent or in good faith, the jury must acquit the defendant upon that count.

Jury Instructions at pp. 75-76. Thus, the jury was adequately instructed as to the defense theory of "good faith," and Instruction 52 subsumed the substance of the defendant's proposed instruction regarding a good faith defense to Count 9. Moreover, the defense was free in the summation to argue how the good faith defense applied to each count of the indictment. This charge more than

substantially instructed the jury that if this defendant had a good faith belief that he was authorized to make the loan and to issue the checks in question, then he must be acquitted, because "good faith" is a defense to each element of each count. The defendant's contention that a new trial must be granted because the court failed to deliver an additional instruction on the "good faith" defense specific to Count 9 and commenting on the evidence on Count 9 is meritless in the totality of the charge to the jury.

5. Defendant's Argument that Defendant Kruckel Believed He Had Authority to Issue Loans and Checks Thereon Prior to Board Approval Requires the Entry of a Judgment of Acquittal on Count 9

Defendant Kruckel asserts that the proof was so overwhelming that he honestly believed that he had authority from UNB's Board of Directors to issue loans and/or checks without prior authorization that a judgment of acquittal must be entered on Count 9. This argument must be rejected. The absence of a plausible basis for defendant's good faith belief that he had authority to issue the Roberts loan (whether *before or after* obtaining approval of the Board or its Executive Committee) was discussed in Part 2, above, and will not be repeated here. By his words and deeds before, during and after the sham loan transaction, the jury could well find beyond a reasonable doubt that defendant Kruckel lacked any reasonable belief that he acted with lawful authority in issuing the "Roberts" loan checks in a sham transaction that received neither prior or subsequent approval as a large commercial loan. The jury had ample basis for finding

bad faith and intent to injure or defraud as charged in Count 9.

6. Defendant's Argument that Bryant Malcolm's Testimony that He Felt He Was Deceived as to The Roberts Loan Was Inadmissible, and That a New Trial should Accordingly be Granted

Defendant Kruckel takes issue with the court's admission of certain opinion testimony from Bryant Malcolm, a member of UNB's Board of Directors, concerning his understanding of a statement made by defendant Kruckel to the Board of Directors. Specifically, defendant Kruckel objects to that portion of the testimony where Mr. Malcolm testified that it was his personal feeling that defendant Kruckel had lied. (TT 9/30/93 at 40:15-16).

During his testimony, Mr. Malcolm recounted a series of events involving three discussions of the Roberts loan. Two of these discussions took place at Board meetings and the other, between Malcolm and Kruckel, took place in Kruckel's car. Mr. Malcolm stated that in April, 1987 defendant Kruckel appeared before the Board of Directors for the purpose of explaining the Roberts loan. At that meeting, defendant Kruckel told the Board that Roberts was a sales manager of a car dealership and that the purpose of the loan was to enable Roberts to purchase that dealership. Immediately after this meeting defendant Kruckel drove Mr. Malcolm home; Mr. Malcolm testified as follows regarding their conversation:

Q: Now, after that special meeting of the Board of Directors, did you have a further conversation with defendant Kruckel about the James Roberts loan?

A: Yes, I did.

Q: And what happened?

A: I didn't have a car that day, I walked down to the meeting and Teddy drove me home. And we sat in the car and for a period of a couple of minutes, discussed the loan, and Teddy personally apologized to me and he said I've been under a lot of pressure, I've been very busy. I know that this loan should have gone in front of you people, I forgot about it. I apologize for this, but I'll tell you, Bryant, it won't happen again.

Q: And how did you feel about defendant Kruckel at this time?

A: I had all the faith in the world in Teddy Kruckel.

(TT 9/30/93 at 41:1-15).

Mr. Malcolm testified as follows regarding the next Board meeting over the objection of defense counsel:

Q: And what happened at the next Board meeting?

A: The Board had gotten feedback on the fact that James Roberts was not a sales manager for this Mercedes Benz Agency, he was a salesman, and the million dollars was not used to purchase the Agency. I don't know how we got that feedback. The meeting started off, and of course, Teddy was immediately faced with the questions, you know, Ted, what the Hell's going on here.

Q: What did he say, what did defendant Kruckel say?

A: Teddy said guys, I had to tell you something to get you off my back.

Q: What did you understand that statement to mean?

[Objection; colloquy between court and counsel]

A: You wish me to reply to this?

Q: Yes, please.

The Court: Yes, sir.

A: Okay. My personal feeling is that Teddy Kruckel lied to me.

Q: And he did so to get you off his back?

A: I wasn't on his back.

Q: The Board?

A: The Board.

Q: Okay.

A: But I felt he lied to me, because of our conversation in particular at my house.

Q: In the car?

A: In the car.

(TT 9/30/93 at 41:16-42:25).

Although defendant does not cite it, the pertinent rule of evidence is Rule 701, Fed.R.Evid. Rule 701 permits the introduction of lay opinion testimony, "limited to those opinions of inferences which are (a) rationally based on the perception of the witness and (b) helpful to

a clear understanding of the witness' testimony or the determination of a fact in issue." *Id.* Certainly Mr. Malcolm's testimony was based on his perception, as Mr. Malcolm was a participant in the events and conversations at issue. Defendant Kruckel implicitly contends that the testimony of Mr. Malcolm that he felt defendant Kruckel had lied to him was admitted improperly because the testimony was not helpful to a clear understanding of a determination of a fact in issue.

A lay witness' opinion testimony is inadmissible under Rule 701 if he is asked to interpret relatively clear statements, as such testimony fails to satisfy the "helpfulness" requirement of the rule. *United States v. De Peri*, 778 F.2d 963, 978 (3d Cir. 1985); *United States v. Dicker*, 853 F.2d 1103, 1008 (3d Cir. 1988). However, where conversations are only clear to the speaker and his intended audience, lay opinion testimony stating the witness' understanding of the testimony may be admitted pursuant to Rule 701. *De Peri*, 778 F.2d at 977; *Dicker*, 853 F.2d at 1109-10. As the court determined at trial in ruling on defense counsel's objection to the testimony by Mr. Malcolm that his personal feeling was that Ted Kruckel lied to him, the statements regarding which Mr. Malcolm was testifying (that Mr. Kruckel told the Board that he had to tell them something to get them off his back) amounted to defendant's admission that he had lied to the Board. Mr. Malcolm was fully competent to express his meaning of what Mr. Kruckel told him, because Mr. Malcolm's opinion was rationally based on his perception of relevant events. Accordingly, defendant's motion for a new trial challenging the admission of Mr. Malcolm's testimony

that he felt defendant Kruckel had lied to him will be denied.

7. Defendant's Argument that the Delay in Indicting Him and the Death of a Potential Witness Warrants a Dismissal of Count 9

Defendant Kruckel contends that the period of investigating this crime, which began in approximately June or July of 1987 and continued until the original Indictment was returned in November, 1992, was unduly long, and that the impact of this lengthy investigation coupled with the death of defendant Kruckel's father-in-law, J. Nevins McBride, the Chairman of the Board of Directors of UNB, in May, 1993, resulted in a denial of due process of law when defendant Kruckel was forced to stand trial on the charges against him without being able to call his father-in-law as a witness. Defendant Kruckel states that Mr. McBride was a witness to the Executive Committee meeting at which the Roberts loan was approved after the fact; however, Mr. Kruckel does not made [sic] a specific proffer of what Mr. McBride's testimony would have been, had he been available to testify at trial.[18] His contention

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[18] The post-trial affidavits of Kitty Kruckel and Richard Brady, Esq., submitted in connection with defendant's reply brief in support of his motions for post-trial relief, do not contain such a proffer. Rather, Mr. Brady merely states that Mr. McBride indicated that he "intended to do all he could to help and support Ted Kruckel in connection with the various investigations by the OCC, the FBI and the U.S. Attorney's Office that had begun in 1987," and Mrs. Kruckel merely states that her father, Mr. McBride, "continued to tell me, even after 1987, that he felt Ted had done a fine job managing the bank and that he

that the due process clause of the constitution requires the dismissal of Count 9 of the indictment is without merit. Further, this contention is raised for the first time after trial, as none of the defendant's many motions before trial asserted that the indictment should be dismissed due to passage of time prejudicing defendant's ability to defend himself.

Defendant Kruckel does not raise a Speedy Trial Clause issue, but he propounds an argument that the case law interpreting the Speedy Trial Clause is appropriately utilized by analogy in assessing whether pre-indictment delay violated a defendant's due process rights, and goes on to argue the case under the balancing test enunciated in *Barker v. Wingo*, 407 U.S. 514 (1972). *See* Def.Br. at 42. In submitting that the court approach the due process challenge in such a manner, defendant disregards well-established controlling Supreme Court and Third Circuit precedent.

The Speedy Trial Clause pertains only to post-indictment delay and has no application in cases like the

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was fully supportive of Ted for his professionalism as a banker." Such generalized information to the effect that Mr. McBride was supportive of his son-in-law is not evidence that the testimony Mr. McBride would have given had he been available to testify would have exculpated defendant Kruckel from any of the charges in the indictment. Moreover, the jury heard repeated testimony by bank employees and character witnesses to the effect that the Board did not terminate Mr. Kruckel as the bank's president, so the jury had an opportunity to infer that J. Nevins McBride did not act to terminate his son-in-law when the Roberts loan problems came to light, despite Mr. Kruckel's inadequate explanations.

present, in which solely pre-indictment delay is alleged.[19] In *United States v. Lovasco*, 431 U.S. 783 (1977), the Court explained this distinction and the underpinnings of the due process protections against pre-indictment delay, articulated in an earlier case styled *United States v. Marion*, 404 U.S. 307 (1971):

> In [*Marion*], this Court considered the significance, for constitutional purposes, of a lengthy preindictment delay. We held that as far as the Speedy Trial Clause of the Sixth Amendment is concerned, such delay is wholly irrelevant, since our analysis of the language, history, and purposes of the Clause persuaded us that only "a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge . . . engage the particular protections" of that provision. We went on to note that statutes of limitations, which provide predictable, legislatively enacted limits on prosecutorial delay, provide " 'the primary guarantee against bringing overly stale criminal charges.' " But we did acknowledge that the "statute of limitations does not fully

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[19] Defendant states in his brief:

> We do not contend that the period the indictment was pending from November 1992 until September 1993 was an inappropriately long time period in light of the multiplicity of different charges and the vast volume of materials that the government had gathered during the course of its over five-year investigation. We do contend, however, that the entire period of the investigation which started in approximately June or July of 1987 and continued until the Indictment was returned, in November of 1992, was overly long.

Def.Br. at 41.

> define [defendant's] rights with respect to the events occurring prior to indictment," and that the Due Process Clause has a limited role to play in protecting against oppressive delay.

Lovasco, 341 U.S. at 788-89 (citations omitted).

Citing *Marion* and *Lovasco*, the Third Circuit has articulated a two-pronged test applicable where a defendant seeks a dismissal of an indictment on the grounds of pre-indictment delay. The defendant must bear the burden to prove: (1) that the Government intentionally delayed in bringing the indictment in order to gain some advantage over him; and (2) this intentional delay caused the defendant actual prejudice. *United States v. Ismaili*, 828 F.2d 153, 167-68 (3d Cir. 1987), *cert. denied*, 485 U.S. 935 (1988).[20]

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[20] *See also United States v. Anagnostou*, 974 F.2d 939 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 1943 (1993). In *Anagnostou*, the Seventh Circuit applied the two-prong test to a claim of a due process violation arising out of pre-indictment delay where a witness had died and determined that the defendant had failed to establish both prejudice and impermissible prosecutorial motive. The court distinguished the recent Supreme Court decision in *Doggett v. United States*, ___ U.S. ___, 112 S.Ct. 2686 (1992), in which the Court held that the Speedy Trial Clause required that where an 8 ½ year post-indictment delay had ensued, prejudice was presumed and need not be proved, and that in such a case mere negligence, not just bad faith, on the Government's part is sufficient to make out a constitutional claim. The *Anagnostou* court explained the limited nature of the due process protections where pre-indictment delay is alleged:

> Although statutes of limitation are the primary safeguard against the potential prejudice – i.e., faded memories, lost evidence, unavailable witnesses – that attends stale criminal charges, the due process clause plays a limited role in protecting against oppressive prosecutorial delay. Limited, indeed, for in the

Defendant Kruckel has failed to carry his burden as to each of the prongs of this test.

The defendant in *Ismaili*, like defendant Kruckel, contended that he was prejudiced by virtue of the death of certain witnesses during the period of the pre-indictment delay. Citing *Lovasco*, the court found that "due process does not bar prosecution whenever a defendant suffers prejudice as a result of pre-indictment delay." *Ismaili*, 828 F.2d at 168. The court went on to hold that the defendant had failed to meet his burden to prove both actual prejudice and intentional delay by the Government for purposes of gaining tactical advantage. Similarly, defendant Kruckel makes absolutely no showing about the cause of the Government's pre-indictment delay and whether it was intentional, and makes an insufficient showing of prejudice. As to prejudice, defendant Kruckel merely states that his father-in-law died in May, 1993 and that he was a member of the Executive Committee who was present when the Roberts loan was ratified after-the-fact, but makes no proffer of his actual testimony. Merely alleging that Mr. McBride was supportive of his son-in-law, Mr. Kruckel, which is the essence of the testimony contained in the two affidavits submitted in support of

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> twenty-five odd cases we have heard raising this claim, we have never found a pre-indictment delay that rose to the level of a constitutional violation. Thus, only the most egregious pre-indictment government delay – that which transgresses "fundamental conceptions of justice" and "the community's sense of fair play and decency" – is proscribed by the constitution.

Id. at 941 (citations omitted).

defendant's motion, does not suffice to carry defendant's burden to show actual prejudice. *See Anagnostou*, 974 F.2d at 942 (speculation that deceased witness would have testified so as to exculpate defendant insufficient to meet burden of showing actual and substantial prejudice) (citing *United States v. Adams*, 834 F.2d 632 (7th Cir. 1987), *cert. denied*, 484 U.S. 1046 (1988)). Under such circumstances, this court concludes, as did the *Ismaili* court, that defendant's Due Process argument must be rejected.

8. Defendant's Argument that a New Trial is Required Because of the Court's Exclusion of Dr. Canavan's Testimony and Other Evidence of Defendant's Alcoholism

At trial, defendant Kruckel sought to introduce expert testimony that he was an alcoholic during the time period relevant to the events alleged in the indictment, and that his disease caused him to be particularly susceptible to Mr. LiButti's influence. Specifically, the defendant sought to introduce evidence in the form of the testimony of Dr. Canavan, defendant's treating physician during the 1970's and a family friend throughout the 1980's, who diagnosed defendant Kruckel as suffering from alcoholism while he was his treating physician (prior to the events alleged in the indictment). After receiving the submissions of the parties and hearing oral argument, the court ruled that this evidence was inadmissible under the Insanity Defense Reform Act of 1984, 18 U.S.C. § 17 et. seq., unless the defendant could link the proffered testimony of Dr. Canavan that defendant Kruckel was an alcoholic with the testimony of other witnesses to the effect that defendant Kruckel was intoxicated at the time

of issuing the loans in question. When defense counsel stated at oral argument that he would not be able to supply any proof to imply such a link, the court ruled that at present, for a lack of a suitable predicate, and because Dr. Canavan was not the treating physician during the time period at issue, the evidence was inadmissible for lack of a proper foundation. This court further found that in any event Dr. Canavan's testimony was being offered as an excuse for conduct rather than to negate the *mens rea* element of the crimes charged, and thus the substance of the evidence proffered through Dr. Canavan was inadmissible absent the additional evidence of intoxication at the time of the events at issue. The court went on to state, however, that if the defendant were able, at a later time, to proffer any evidence to show that persons tried to influence defendant Kruckel through drinking or that the defendant made loans to such persons while under the influence of alcohol, the substance of the evidence regarding defendant Kruckel's alcoholism could be admitted. No such proffer was made then or at any later point in the trial, and Dr. Canavan was not permitted to testify.

The court's ruling was properly based upon controlling Third Circuit precedent, *United States v. Pohlot*, 827 F.2d 889 (3d Cir. 1987), *cert. denied*, 484 U.S. 1011 (1988). The court in *Pohlot*, interpreting 18 U.S.C. § 17, concluded that in enacting the Insanity Defense Reform Act, Congress did not preclude all use of psychiatric evidence to negate specific intent when such evidence focuses on the defendant's specific state of mind at the time of the charged offense, but that the Act does preclude defenses akin to diminished responsibility and the presentation of

the jury of needlessly confusing psychiatric testimony. *Id.* at 903.[21] The court held:

> District courts should admit evidence of mental abnormality on the issue of mens rea only when, if believed, it would support a legally acceptable theory of lack of mens rea.

Id. at 905-06. Embracing the *Pohlot* decision, the Eleventh Circuit in *United States v. Cameron*, 907 F.2d 1051 (11th Cir. 1990) expounded:

> Because psychiatric evidence (1) will only rarely negate specific intent, (2) presents an inherent danger that it will distract the jury from focusing on the actual presence or absence or *mens rea*, and (3) "may easily slide into wider usage that opens up the jury to theories of defense more akin to justification," *Pohlot*, 927 F.2d at 904-05, district courts must examine such psychiatric evidence carefully to ascertain whether it would, if believed, "support a *legally acceptable* theory of lack of *mens rea*." *Id.* at 906. For all of the above reasons, such evidence should be evaluated outside the presence of the jury.

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[21] 18 U.S.C. § 17 provides:

(a) Affirmative defense – It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

(b) Burden of proof – The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

Cameron, 907 F.2d at 1067. This is precisely the analysis undertaken and articulated by this court on the Government's application to exclude the testimony of Dr. Canavan.

The *Pohlot* court noted that intoxication may negate a state of mind required for the commission of a specific intent crime, noting at 827 F.2d at 897:

> As the Senate Report to the Insanity Defense Reform Act summarizes, "the voluntary use of alcohol" does not constitute any "species of legally valid affirmative defense," but "intoxication may negate a state of mind required for the commission of the offense charged." *Senate Report* [Report of the Senate Judiciary Committee, S. Rep. No. 98-225, 98th Cong., 2d Sess. (1984)] at 229 & n. 30.

Defendant has pointed to no precedent for the proposition that alcoholism itself, unaccompanied by intoxication, negates the state of mind required for a specific intent crime.

In order to establish a "legally acceptable theory of lack of *mens rea*," the defendant would have had to prove not just that he was an alcoholic and as such was, as a general matter, susceptible to influence from those who took him drinking, but rather that *at the time of making the loans in question* the defendant lacked the specific intent to defraud the financial institution, to willfully misapply the funds, or the like. At no time has defendant alleged that his alcoholism made him susceptible to such influence by drinking companions such as LiButti that it rose to the level of coercion or duress.

When pressed for such a proffer outside the presence of the jury, defense counsel conceded that he had no such evidence to offer. Counsel proffered, for example, no evidence at all that Mr. Kruckel was impaired by alcohol while on duty at the bank; to the contrary, many witnesses testified to his formidable abilities as a banker and builder of a successful enterprise. In five weeks of trial, there is no evidence that Mr. Kruckel was intoxicated or impaired by alcohol at any time that he was engaging in the allegedly criminal acts. Regarding Count 9, there is no evidence of Mr. Kruckel drinking on or about September 15, 1986, nor at any of the subsequent relevant dates. There is no evidence that Mr. Kruckel was induced to make the "Roberts" loan due to the influence of alcohol either being withheld or provided to him by LiButti. If evidence of intoxication or coercion at the time of making the loans were available, the court would have been inclined to permit the introduction of the additional testimony regarding defendant's alcoholism, an inclination made clear to the parties at oral argument and upon repeated occasions thereafter. Absent such evidence – even putting aside the court's concerns about the fact that Dr. Canavan was not the defendant's treating physician during the relevant time period – the proffered testimony of defendant's alcoholism would not have served to support a permissible theory of a lack of the requisite specific intent to commit the crimes charged in the indictment, but rather would serve to support an impermissible theory that the defendant's actions should be excused because he was an alcoholic, and further would confuse the issues properly before the jury. The *Pohlot* court made clear that the Insanity Defense Reform Act prohibits the

introduction of such evidence to prove affirmative defenses such as justification or excuse.

Defendant's proffer of Dr. Canavan's testimony about defendant's alcoholism was also rejected for a second reason: there was no "fit" between Dr. Canavan's proffered testimony and the pertinent factual inquiry in the case. In assessing whether a proffer of expert testimony meets the "helpfulness" standard of Rule 702, Fed. R. Ev., the judge must determine whether the proffered testimony is "sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, ___ U.S. ___, 61 U.S.L.W. 4805, 4808 (June 29, 1993), quoting *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985). This involves assessing the goodness of "fit" of the connection between the specialized knowledge of the expert and the pertinent factual inquiry in the case. *Id.*; *see also United States v. Dowling*, 855 F.2d 114, 119 (3d Cir. 1988); *United States v. Stevens*, 935 F.2d 1380, 1400-01 (3d Cir. 1991). In the present case, there was no factual basis offered for the proposition that alcohol played a role in Mr. Kruckel's criminal conduct charged in Count 9.

As the Government points out, the issue presented by defendant Kruckel is similar to that presented in *Cameron*, where the trial court refused to permit the defendant to introduce certain psychiatric evidence. In that case, the defendant offered to prove that psychiatrists had on two occasions diagnosed her as schizophrenic, and that she was receiving some sort of psychological counseling at the time the charged offenses took place. Because the defendant failed to demonstrate how the psychiatric evidence would negate intent (to distribute

"crack" cocaine) and not merely present a dangerously confusing theory of defense more akin to justification and excuse than to a "legally acceptable theory of a lack of *mens rea*," the court upheld the district court's exclusion of the psychiatric evidence. *Id.* at 1067 (citing *Pohlot*, 827 F.2d at 906).

Applying these principles to the case before it on the basis of the total proffer made by defense counsel, the court properly ruled that Dr. Canavan's testimony could not be presented to the jury, as, absent factual evidence regarding defendant's mental state at the time of making the loans at issue, the evidence proffered through Dr. Canavan did not tend to support a theory that would negate an intent to commit the crimes charged. Defendant's motion for a new trial on the ground of the exclusion of such evidence must accordingly be denied.

9. Defendant's Argument that the Ex Post Facto Clause Requires Dismissal of the Indictment on Count 9

Defendant again raises the argument addressed during pretrial motion practice that the ex post facto clause of the constitution requires dismissal of the indictment as to Count 9. Defendant previously argued that the prosecution on all bank fraud charges was barred by the statute of limitations, a contention the court rejected, along with defendant's ex post facto argument, in its August 13, 1993 Opinion.

This motion cannot be addressed in the abstract; its disposition depends entirely upon the relevant dates. The indictment charges defendant Kruckel with violating § 1005 of Title 18 beginning on or about September 15,

1986. On that date, the relevant statute of limitations was five years. 18 U.S.C. § 3282. Effective August 9, 1989, Title 18 was amended and the statute of limitations applicable to § 1005 offenses, *inter alia*, was extended to ten years in 18 U.S.C. § 3293. *Id.* Defendant's papers gloss over this point, as if this court had not already decided this very issue previously. It is critical to note that as of the date the relevant statute of limitations was extended, August 9, 1989, the defendant's conduct alleged in the indictment to have been in violation of § 1005 was not barred by the five-year limitation period contained in § 3282 prior to amendment. That is, on August 9, 1989, the five-year limitations period applicable to the September 15, 1986 conduct of the defendant alleged in Count 9 *had not yet run*. Similarly, the substantive offense charged under § 1005 was not modified by the 1989 amendment in § 3293. Under such circumstances, neither the statute of limitations nor the ex post facto clause bars prosecution here, where an indictment was returned within ten years of September 15, 1986, on October 29, 1992.

As the court explained in its August 13, 1993 Opinion, the ex post fact [sic] clause precludes the legislative enactment of " 'any law' which imposes a punishment for an action which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.' " *Weaver v. Graham*, 450 U.S. 24, 28 (1981) (quoting Cummings v. Missouri, 4 Wall. 277, 325-26 (1867)). It does not preclude a legislative extension of time within which the Government must bring charges for conduct that was a crime when committed, provided that the then-existing statute of limitations had not expired before the enactment. *United States v. Richardson*,

512 F.2d 105, 106 (3d Cir. 1975) (per curiam). Certainly defendant Kruckel agrees that the conduct alleged in Count 9 of the indictment was a crime under § 1005 at the time of the conduct, on and after September 15, 1986. What defendant Kruckel apparently fails to appreciate is that the then-existing five-year statute of limitations had not expired for 1986 crimes at the time of the August 9, 1989 enactment extending the relevant statute of limitations, and thus Congress had the power to extend the period of limitations for bringing charges for defendant's conduct. *See Richardson*, 512 F.2d at 106; *United States ex rel. Massarella v. Elrod*, 682 F.2d 688, 689 (7th Cir. 1982), *cert. denied*, 460 U.S. 1037 (1983) ("Extending a limitation period *before* a given prosecution is time-barred does not violate the ex post facto clause") (emphasis original).[22]

Defendant urges the court to consider a case not previously cited in his briefs, *Collins v. Youngblood*, 497 U.S. 37, 110 S.Ct. 2715 (1990). The court has reviewed that decision and finds that it offers no new support for defendant's arguments. The Court in *Collins* held that a change in a law which is labelled "procedural" by the legislature is not necessarily immunized from scrutiny

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[22] Moreover, unlike in *Richardson*, 512 F.2d at 106, Congress has made clear its intention that the new statute of limitations in § 3293 is to apply to offenses committed before the statute's enactment. *See* Section 2505(b) of Pub.L. 101-647 (providing that § 3293 "shall apply to any offense committed before the date of enactment of this section, if the statute of limitations applicable to that offense had not run as of such date.") The Congressional intent that the 10-year statute of limitations shall apply to all § 1005 offenses upon which the old 5-year statute had not yet expired by August 9, 1989, could not be more clearly expressed.

under the ex post facto clause. *Id.* at 2721. The court went on to reiterate that the protections offered by the ex post facto clause are limited to the following situations: where a law punishes as a crime an act previously committed which was innocent when done; where a law makes more burdensome the punishment for a crime after its commission; or where a law deprives one of a defense available under the law in effect when an act was committed. *Id.* at 2719 (citing *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925)). Defendant's contention, based on Collins, that a change in the relevant statute of limitations is not to be considered "procedural" for purposes of the ex post facto clause is immaterial, because the change in the law effected by the August 9, 1989 enactment of § 3293 took place at a time when defendant's conduct could have been the subject of prosecution under the then-existing statute of limitations. Defendant's motion for post-trial relief on statute of limitations and ex post fact clause grounds will be denied.

10. Defendant's Argument that All Other Evidence in the Case Prejudiced the Trial of Count 9

Defendant Kruckel challenges the jury's verdict on Count 9 by asserting that certain other counts in the indictment "had a totally inadequate basis and should never have been brought to trial" and that the introduction of evidence as to these other counts "prejudiced the trial on Count 9." Def.Br. at 51. Defendant advances two principal arguments in support of his motion: (1) that the evidence on the Ballis transaction was insufficient and

that the Government was aware of evidence that disproved its theory of the case; and (2) the obstruction and perjury charges "were logically defective."

The threshold question is whether defendant may challenge the verdict on Count 9 – the only count on which the jury returned a verdict of guilty – by taking issue with the court's denial of defendant's motion pursuant to Fed.R.Crim.P 29(a) at the close of the Government's case for a judgment of acquittal as to counts other than Count 9. Although the defendant does not cite any cases in support of this argument for a new trial, assuming for the moment that defendant states a cognizable claim for post-trial relief distinct from his claim in Point 1, *supra*, regarding the sufficiency of the evidence on Count 9,[23] certainly a new trial is not required where, as here, the court properly ruled that sufficient evidence existed at the close of the Government's case for the case to proceed to a jury on each count in the indictment.

Where a judge considers a defendant's motion for judgment of acquittal under Rule 29(a), Fed. R. Crim. P., before submission to the jury, court "shall order the entry of judgment of acquittal . . . if the evidence is insufficient to sustain a conviction of such offense or offenses." In

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[23] *Cf. Lewis v. United States*, 382 F.2d 232 (8th Cir. 1967) (in context of reservation of decision on Rule 29(b) motion made at close of all the evidence, where defendant was tried before jury on two counts, the first charging him with delivering counterfeit notes and the second charging him with aiding and abetting passing of such notes, and jury verdict of guilty was returned on both counts but court set aside conviction on count 2, defendant was not severely prejudiced by the court's allowance of the count one determination to go to the jury).

determining whether such evidence is insufficient, the court may not weigh the evidence and assess the credibility of witnesses when it judges the merits of a motion for acquittal. *Burks v. United States*, 437 U.S. 1, 16 (1978) [citations omitted]. The Supreme Court has indicated:

> The prevailing rule has long been that a district judge is to submit a case to the jury if the evidence and inferences therefrom most favorable to the prosecution would warrant the jury's finding the defendant guilty beyond a reasonable doubt.

Id. [citations omitted]. In the present case, there was ample evidence on each count from which a reasonable jury could have found proof of Mr. Kruckel's guilt beyond a reasonable doubt, as stated in the court's oral opinions of October 4, 1993 (at the close of the government's case) and on October 12, 1993 (at the close of all the evidence) finding that the proofs met this standard. The closing argument of AUSA Levy on October 14, 1993, accurately reiterated these proofs in greater detail. That the jury found reasonable doubt as to at least one element of each count other than Count 9 scarcely demonstrates that the defendant was prejudiced by the submission of these counts to the jury.

The defendant's present motion argues generally that there was much exculpatory evidence to justify an acquittal. The defendant must realize, however, that the jury was free to reject the arguments of defense counsel which sought to inject reasonable doubt, and to accept the government's interpretation of the evidence. Fortunately for Mr. Kruckel, and rather surprisingly, frankly, the jury

found the government had not met its burden on the remaining counts.

Evidence admitted at trial on the counts that were eventual acquittals can likewise provide no basis for a claim of prejudice. It is the nature of any trial of two or more offenses that a jury must consider each charge separately and can reach verdicts of acquittal on some charges and convictions on others. The joinder of all offenses in a single trial against defendant Kruckel was proper under Rule 8(a), Fed. R. Crim. P., which presumes that separate offenses will be joined for trial when they "are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." Defendant Kruckel never sought relief from the allegedly prejudicial joinder of offenses against him,[24] and he cannot do so now in a motion attacking the alleged spillover of evidence from the counts of acquittal to those of conviction. Were the law on this point otherwise, any defendant who is acquitted on one or more counts and convicted on others could assert – after the fact – that joinder of counts was prejudicial without having sought severance before trial.

For these reasons, defendant's motion for new trial on this ground will be denied.

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[24] Defendant Kruckel's motion for severance of defendants, however, was made and granted in the Opinion of August 13, 1993, so that all charges against co-defendant LiButti were tried separately.

11. Defendant's Argument that Prosecutorial Misconduct Requires a Dismissal of the Charges Against Him

Defendant Kruckel alleges instances of prosecutorial misconduct in support of his motion for a judgment of acquittal. The instances of alleged misconduct concern statements by James Roberts and Bryant Malcolm. Neither of these instances constitutes prosecutorial misconduct, nor do they provide a legal basis for vacating the jury's verdict under Rule 29 or for granting a new trial under Rule 33.

Defendant Kruckel claims that the testimony of James Roberts deceived the court in two respects: (1) when he testified that "there were not supplemental proceedings against him"; and (2) when he testified as to his prior immunity arrangements." Def.Br. at 56. Regrettably, defendant Kruckel neglects to cite the specific testimony he finds objectionable. As the Government's brief aptly demonstrates, the evidence to which defendant Kruckel appears to be referring does not support his claim of prosecutorial misconduct.

James Roberts was a key cooperating witness for the United States. In his direct testimony on September 22, 1993, he testified in detail about his financial dealings with Kruckel and LiButti, and especially the "Roberts loan" transaction and the alleged solicitation of perjury by defendant Kruckel. He testified, as he noted, under a non-prosecution agreement dated September 3, 1993 (Ex. G-830), which protected him from prosecution for the UNB financial transactions but not for perjury. Roberts was cross-examined at length on his non-prosecution

agreement, and he was to return to complete his testimony when his schedule permitted (by previous agreement) on September 29, 1993. The government had timely turned over this information to the defense consistent with its obligations under *Giglio v. United States*, 405 U.S. 150 (1972), because the non-prosecution agreement confers a substantial benefit upon the cooperating witness.

During an in camera inspection of agent's notes of interviews of Roberts (Ex. C-1 to C-9) produced on the intervening trial day, however, the court noticed a reference to a Roberts debriefing session in 1991 pursuant to a "proffer agreement" that had not been turned over as *Giglio* material, and the court directed the government to do so. Prior to the resumption of Roberts' cross-examination, the Assistant U.S. Attorney located the 1991 proffer agreement (Ex. D-35) – which they had overlooked – and produced it to Mr. Plaisted. Confronting the witness with his own proffer agreement dated August 14, 1991, Mr. Plaisted performed a very effective cross-examination since the protection afforded to Roberts by the government's agreement to not use his own interview statements against him had not been disclosed in his direct examination. Defense counsel also used Ex. D-35 (the 1991 proffer agreement) to cast doubt on Roberts' direct testimony to the effect that he had no immunity for his 1992 grand jury testimony. In fact, the 1991 proffer agreement granted immunity only against the use of Roberts, own interview statements against him, but it extended no general immunity. That came only with the 1993 non-prosecution agreement (Ex. G-830) which was fully disclosed.

The Government acknowledges that its proffer agreement with Mr. Roberts was disclosed late in the course of the trial. The Government also acknowledges its obligation to disclose all exculpatory evidence. *Brady v. Maryland*, 373 U.S. 83 (1963).

Impeachment evidence falls within the *Brady* rule. *Giglio v. United States*, 405 U.S. 150, 154 (1972). This case is not governed directly by *Brady*, however, because the disclosure of the proffer agreement was made prior to the end of the trial; what is presented is a delayed disclosure situation rather than a nondisclosure situation. "A delayed disclosure by the prosecution is not per se reversible error." *United States v. Kaplan*, 554 F.2d 577, 580 (3d Cir. 1977).

In *Kaplan*, the court was presented with a situation like the present where evidence assumed to be exculpatory became available late, but prior to the conclusion of the Government's case, and counsel for the defense had the opportunity to utilize the evidence after disclosure. The court explained the relevant standard as follows:

> If exculpatory evidence can be effectively presented at trial and the defendant is not prevented by lack of time to make needed investigation, there is no reversible prosecutorial misconduct in ill-timed presentation.

Id. at 580. The court went on to find no evidence of prejudice to the defense. *Id.*

Similarly, the present circumstances, involving the discovery and disclosure of *Giglio* material before the completion of cross-examination of the government's cooperating witness, is distinguishable from *United States*

v. Galvis-Valderamma, 841 F. Supp. 600 (D.N.J. 1994), in which a critical potentially exculpatory statement by the arresting officer was not discovered and disclosed until after the jury's verdict. That statement was exculpatory in substance and could lead to impeach the officer's testimony, and its non-disclosure was a material breach of the prosecutor's *Brady* and *Giglio* duties because, as this court found, "under all the circumstances of this case, there [was] a reasonable probability that, had the evidence been disclosed, the result of the trial would have been different," *United States v. Galvis-Valderamma*, 841 F. Supp. at 610, *citing United States v. Bagley*, 473 U.S. 667, 682 (1985).

In the present case, on the other hand, the 1991 proffer agreement was disclosed in time for its effective use, and it offered little additional perspective upon the nature and extent of Roberts' agreement with the government that was not already encompassed in the much broader 1993 non-prosecution agreement. Under *Giglio*, the government's disclosure of the 1993 non-prosecution agreement provided broad ammunition for defendant's attack on Roberts, motives in testifying, and the later disclosure of the 1991 limited proffer agreement only added fuel to that fire.

In the present case, as in *Kaplan, supra*, defendant made effective use of the proffer agreement on cross-examination and thus was not prejudiced by late disclosure of the evidence. Defense counsel conceded as much at trial:

> The Court: – Has the defendant suffered prejudice?

> Mr. Plaisted: I hate to say no, but I can't really identify anything off the top of my head presently, Your Honor. I'd like to think about it since it has come up, overnight but I mean I can't articulate anything at present.

(TT 9/29/83 at 219:10-14). As the court articulated at trial, in light of the effective cross-examination of the witness by defense counsel after the delayed disclosure, the entire incident was probably a "net plus" to the defendant. Thus, while the court by no means condones the conduct of the Government in this instance (because a more thorough review of their agent's interview notes would have led government counsel to find the proffer agreement), defendant Kruckel is not entitled to post-trial relief on this ground.

Nor is the defendant entitled to post-trial relief on the additional ground that the Government delayed disclosure of certain documents relating to the UNB lawsuit against Mr. Roberts. Defendant's argument on this point is apparently based upon the following testimony by James Roberts on direct examination:

> Q: Has Urban National Bank instituted any supplemental proceedings against you?
>
> A: Not to my knowledge, no.
>
> Q: Has the bank ever taken your deposition in connection with this?
>
> A: No, they have not.
>
> Q: Have they ever garnished your wages?
>
> A: No, they have not.

(TT 9/22/93 at 222:6-13).

On cross-examination, after being shown various documents pertaining to a lawsuit initiated by UNB against him, Mr. Roberts admitted that he had seen some of the documents and that in fact there was a lawsuit against him. (TT 9/23/93 at 97:12-18). During cross-examination, Mr. Roberts also admitted that he had copies of some of these documents; the court subsequently ordered these documents to be turned over to defense counsel. (TT 9/23/93 at 99:7-100:18). These documents were solely in Roberts' possession and he retrieved them from the trunk of his car that same day. There is no reason to believe that the government had copies of these documents in its possession, nor that the prosecution played any role in Roberts' failure to have recalled the proceedings in the UNB lawsuit. The documents were retrieved by Roberts from his automobile, turned over to the defense during the lunch break, Roberts was effectively cross-examined on them, and certain of the documents were admitted into evidence. (TT 9/23/93 at 102:1-120:16).

Under the analysis set forth above, although the Government concedes that there was a late disclosure of the documents relating to the UNB lawsuit against Roberts, there was no prejudice to the defense. The court finds that the government lacked possession or knowledge of those documents and that defendant Kruckel was nonetheless able to make effective use of those documents on cross-examination. *See Kaplan*, 554 F.2d at 580. *See also United States v. Harris*, 498 F.2d 1164, 1170 (3d Cir.), *cert. denied*, 419 U.S. 1069 (1974) (Government acted improperly in failing to correct false testimony of one of its key witnesses on direct examination regarding the existence

of an agreement between prosecutor and witness, but no reversible error occurred; defense counsel had an obligation to undertake remedial action where facts came to light prior to close of the Government's case).

The *Harris* case also provides guidance with regard to the final issue raised by defendant Kruckel concerning alleged prosecutorial misconduct. Defendant Kruckel argues that because the prosecutors told another of their witnesses, Bryant Malcolm, that James Roberts was not a sales manager (*see* TT 9/30/93 at 67:12-22), defendant is entitled to post-trial relief. However, at a side-bar convened to discuss defendant's objection to the fact that the prosecutors had made such a representation to Mr. Malcolm in the course of preparing the witness, defense counsel stated. at the end of the argument. that he was dropping the issue. (TT 9/30/93 at 69:5-7). Thus, after obtaining the information from the prosecution as to what information was imparted to Mr. Malcolm in preparation for his testimony, defense counsel did not request an opportunity to further question Mr. Malcolm. Rather, defense counsel elected not to pursue the matter further before the jury. *Harris* teaches that defense counsel will be deemed to waive a right to allege error if defense counsel does not act at trial to make effective use of information belatedly revealed by the Government even under circumstances, unlike those in the present case, where the conduct of the Government at issue was egregious. *Id.* at 1170. In that case, the Government elicited false testimony from a key prosecution witness to the effect that she did not have any understanding that the Government would assist her in a state proceeding against her in exchange for her testimony, and the Government failed to

correct that testimony. Although the court was seriously troubled by the Government's misconduct, it held that because the information was ultimately disclosed to the defense prior to the close of the Government's case-in-chief and because defense counsel did not attempt after disclosure to present evidence of the agreement between the witness and the Government to the jury, such inactivity on the part of defense counsel constituted a waiver of the right to allege error on appeal. *Id.* at 1170. By failing to pursue the matter of the prosecution's representations to Mr. Malcolm after obtaining the necessary information from the prosecution, defendant Kruckel must be deemed to have waived any right to assign error to the delayed disclosure.

Moreover, even when considered on the merits of defendant's motion, the underlying activity by the Government did not constitute misconduct. No misrepresentation was made by the Government to Mr. Malcolm, in light of the truth of Mr. Roberts' own testimony that he was actually unemployed at the time the loan in question was issued to him. (TT 9/30/93 at 67:12-22). Counsel for the Government did not mislead Mr. Malcolm. Thus, there is no basis for defendant's contention that misconduct by the Government at trial requires the granting of a new trial or the entry of a verdict of acquittal.

12. Defendant's Renewed Argument that a Verdict of Acquittal must be Entered because the Government Refused to Provide any of the Indicting Grand Juries with Certain Exculpatory Evidence

Defendant Kruckel contends, as he did pre-trial, that the indictment should have been dismissed because the

Government refused to provide the indicting grand juries with the transcripts of defendant's testimony before the OCC and the transcripts of defendant's deposition testimony taken in a civil action involving Mr. LiButti. Both items were in the Government's possession at the relevant time, and in the defendant's view the documents contained critical information exculpatory to the defendant. Defendant cites no cases in support of his argument. The court has previously ruled that the indictment is not subject to attack on this ground. See Opinion of August 13, 1993 at 11-12.

As the Government correctly points out, *United States v. Williams*, ___ U.S. ___, 112 S.Ct. 1735 (1992) is controlling and disposes of defendant's argument. In *Williams*, the Supreme Court considered the question raised here – that is, whether failure to present supposedly exculpatory evidence to the grand jury requires dismissal of the indictment or otherwise vests a defendant with substantive rights. The Court answered that question in the negative. *Id.* at 1741-46. After reviewing the historical functions of the grand jury and the limited supervisory role the federal judiciary may permissibly exercise over that institution, the court determined that "imposing upon the prosecutor a legal obligation to present exculpatory evidence in his possession would be incompatible" with the grand jury system. *Id.* at 1745. The Court concluded that the federal courts "have no authority to prescribe such a duty pursuant to their inherent supervisory authority over their own proceedings." *Id.* at 1746.

Williams is indistinguishable from the present case and requires this court to reject defendant's argument that he is entitled to some form of relief on the basis of

the prosecutor's refusal to present transcripts of defendant Kruckel's OCC testimony and civil deposition testimony to the indicting grand juries. Defendant's motion must therefore be denied.

CONCLUSION

For the reasons expressed herein, the court concludes that none of the eleven bases raised in defendant's post-trial motions for a new trial or for a judgment of acquittal entitles defendant Kruckel to the relief requested. Accordingly, defendant's motions will be denied.

An Order denying the motion follows.

May 5, 1994
Date

/s/ Jerome B. Simandle
JEROME B. SIMANDLE
U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	
v.	:	Criminal Action
	:	No. 92-611 (JBS)
THEODORE KRUCKEL,	:	
Defendant.	:	
	:	

ORDER

(Filed May 5, 1994)

This matter having come before the court upon the motion of defendant, Theodore Kruckel, for a new trial on Count 9 pursuant to Fed.R.Crim.P. 33 and for the entry of a verdict of acquittal as to Count 9 pursuant to Fed.R.Crim.P. 29(c); and the court having considered the submissions of the parties and the oral arguments of counsel; for reasons expressed in the Opinion of today's date;

IT IS this 5th day of May, 1994 hereby

ORDERED that defendant's motion is DENIED.

/s/ Jerome B. Simandle
JEROME B. SIMANDLE
U.S. DISTRICT JUDGE

United States District Court for the

United States of America

vs.

DEFENDANT THEODORE KRUCKEL

DOCKET NO. Cr. 92-611-01

JUDGMENT AND PROBATION/ COMMITMENT ORDER AO-245 (9/82)

(Filed May 20, 1994)

In the presence of the attorney for the government the defendant appeared in person on this date →	MONTH	DAY	YEAR
	05	17	94

COUNSEL

[___] **WITHOUT COUNSEL** However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[XX] **WITH COUNSEL** [James Plaisted, Esquire]
(Name of Counsel)

PLEA

[___] **GUILTY**, and the court being satisfied that there is a factual basis for the plea,

[___] **NOLO CONTENDERE,**
[___] **NOT GUILTY**

FINDING & JUDGMENT

There being a finding/
verdict of { [XX] **NOT GUILTY.** Defendant is discharged 1, 2, 4, 5, 7, 8, 11, 12, 13 & 14

{ [XX] **GUILTY.** as to Count 9

Defendant has been convicted as charged of the offense(s) of 18 USC 1005 and 2 Making Improper Loan.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 36 months.

SPECIAL CONDITIONS OF PROBATION

It is further ordered that the defendant make restitution to the Urban National Bank in the amount of $500,000 pursuant to the Victim Witness Protection Act (18 U.S.C. 3663).

It is further ordered that a fine of $50,000 is imposed upon the defendant, and a special assessment of $50.00 is also imposed.

It is further ordered that the execution of the term sentence of imprisonment is hereby stayed pending appeal,

upon motion of the defendant pursuant to 18 U.S.C. Section 3143(b).

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends, a minimum security facility.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

[X] U S District Judge

[___] U S Magistrate

➤ /s/ Jerome B. Simandle
Jerome B. Simandle, USDJ]
Date 5-20-94]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-5301

UNITED STATES OF AMERICA,

v.

THEODORE KRUCKEL

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ROTH, LEWIS, McKEE, and SAROKIN, *Circuit Judges*

The petition for rehearing filed by Appellant Theodore Kruckel in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ D.K. Sloviter
Chief Judge

Dated: April 7, 1995